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IN THE

Supreme Court of the United States

STROMAN REALTY, INC.,
Petitioner,

v.

SAM WERCINSKI, Commissioner of the Department of Real Estate for the State of Arizona,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is confusion among the courts of appeals and the district courts regarding the proper standard to apply when assessing whether the exercise of personal jurisdiction is appropriate over non-resident public officials in Section 1983 actions. Some circuits apply the long-arm jurisdiction statutes of the forum state with a Fourteenth Amendment due process analysis while others engraft extra requirements in addition to the standards set forth in the applicable state long-arm statute. There is also disagreement among the circuits as to whether, in a federal question case, a Fourteenth or a Fifth Amendment due process analysis, or any due process analysis at all, should ensue following a determination that jurisdiction exists under the state long-arm statute.

The questions presented for review are as follows:

1. Whether the same personal jurisdictional analysis should apply in a case against a non-resident public official as that applied in a case against a non-resident private litigant, or whether additional minimum contacts beyond those set forth in the state long-arm statute should be imposed where the defendant is a state official.

2. Whether the due process analysis of the Fifth Amendment rather than the Fourteenth Amendment should apply in assessing long-arm jurisdiction in a federal question case where the state long-arm statute requirements are met.

3. Whether any due process analysis is required after state long-arm criteria are met if the federal claim is against a public official acting in his official capacity when states have no due process rights.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Stroman Realty, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 513 F.3d 476 (5th Cir 2008). App.1a-23a. The order denying the petition for rehearing en banc is unreported. App. 32a-33a. The opinion of the United States District Court for the Southern District of Texas is unreported. App. 24a-30a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on January 11, 2008. It denied petitioner's petition for rehearing on February 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause provides:

> No Person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The Due Process Clause of the Fourteenth Amendment provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV § 1.

Fed. R. Civ. P. 4(k)(1)(A) provides:

> . . . Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> > (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . .

Tex. Civ. Prac. & Rem. Code Ann. § 17.041 provides:

> In this subchapter, "nonresident" includes:

(1) an individual who is not a resident of this state; and

(2) a foreign corporation, joint-stock company, association, or partnership.

Tex. Civ. Prac. & Rem. Code Ann. § 17.042 provides:

In addition to other acts that may constitute doing business, a nonresident does business in this state if the non-resident:

. . .

(2) commits a tort in whole or in part in this state;

. . .

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents the Court the opportunity to resolve a conflict among the circuit courts of appeals and to address the question left unanswered in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) as to when it is appropriate to exercise jurisdiction over foreign state officials in a Section 1983 action. The first question is whether, in actions brought under 42 U.S.C. § 1983, a state official engaging in unconstitutional conduct enjoys a different standard for personal jurisdiction than other tort defendants. The Ninth Circuit has held that the tort effects test of *Calder v. Jones*, 465 U.S. 783 (1984) applies to Section 1983 actions against state officials. *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995). The Fifth Circuit in this case, however, held that the non-tort standard set forth in *Kulko v. Superior Court*, 436 U.S. 84 (1978) applied. Other circuits have split on whether, once a state's minimum contacts test is met in a federal question case, a Fourteenth Amendment due process analysis applies when state comity concerns are not present. Similarly, given that cases against public officials in their official capacity are really claims against the state and due process is an individual liberty, the Court should address whether any due process test is warranted. The question of what personal jurisdiction analysis to apply to state officials is one of great controversy, with no clear answer. *See* Tracy O. Appleton, *The Line Between Liberty and Union: Exercising Personal Jurisdiction Over Officials From Other States*, 107 COLUM L. REV. 1994 (2007). The correct standard to be applied in Section 1983 cases for assessing personal jurisdiction is a question of exceptional importance and should be established by the Court.

1. The Timeshare Industry.

Stroman engages in the real estate brokerage of timeshares in the secondary market on behalf of individual owners. App. 34a-35a. As of 2002, Arizona had 46 timeshare resorts with 4,640 individual units. App. 38a. Approximately 84,162 Arizona residents own a timeshare, ranking it as the fifth largest state in the country in terms of vacation ownership. *Id.* In Arizona, as in other states, timeshares are treated as real property interests subject to the state's real estate laws in the advertising, sale and brokerage of these interests. *See* App. 47a-50a.

The bulk of timeshare resale buyers live outside the state where the use facility is located. For example, only 13.9% of the 519,000 timeshare units in Florida are owned by Florida residents (App. 38a), and a limited survey of 1997 closed resale transactions showed that in every state but two, more than 72% of the buyers lived in a state different than the property location. *Id.*

Potential purchasers in the resale market for timeshares are located throughout the country and the world, as are potential sellers. App. 42a. To market intervals effectively for resale, a nationwide marketing program is necessary to reach these dispersed buyers and sellers. App. 40a. Timeshare resale brokers have filled this niche and can fund nationwide advertising campaigns by pooling advertising fees collected from individual owners wishing to resell their timeshare intervals. Stroman was one of the first and largest resale brokers. App. 41a.

2. Stroman's Lawsuit.

Stroman has conducted its timeshare brokerage business in the interstate resale market for over

twenty-five years. App. 41a, 46a. All of Stroman's operations are conducted in Texas. App. 41a, 45a-46a. Stroman spends millions of dollars each year on its national advertising and promotional efforts, and has an active internet site that promotes its services worldwide. App. 44a. Stroman agents speak daily to approximately 1,000 different people residing in numerous states and outside the United States. App. 45a. Callers often inquire about different timeshares available in several different states during the same call. *Id.*

Each of Stroman's sales associates is a licensed real estate salesperson or broker in the State of Texas and a member in good standing of the National Association of REALTORS.® App. 43a. They are bound by the statutes and regulations of the State of Texas and the Code of Ethics and Standards of Practice of the National Association of REALTORS.® App. 43a. Both the laws of the State of Texas and the Code of Ethics and Standards require honesty by a real estate agent and prohibit false or misleading representations. App. 43a-44a.

Stroman has never had an office in any state other than Texas. App. 46a. It has no employees or agents in Arizona. *Id.* Stroman's agreements to advertise and market timeshares are governed by Texas law, are performed in Texas, and payments from clients are received in Texas. App. 45a-46a. Stroman has clients who reside in the Southern District of Texas who own or are interested in purchasing or selling timeshare facilities in Arizona. App. 35a-36a.

In 2000, the respondent, Commissioner of the Department of Real Estate for Arizona ("Commissioner"), issued an administrative cease and desist order, which it served on Stroman in Texas by mail.

App. 47a, 67a-74a. The Commissioner claimed authority to impose the order against Stroman for its Texas activities, and the authority to summon Stroman into Arizona to defend itself against an administrative proceeding. App. 71a-73a. In that order, the Commissioner asserted that Stroman, because it was unlicensed in Arizona, could not transact any business involving Arizona residents or real property located in Arizona. App. 71a-72a. The Commissioner forbade Stroman from contacting "Arizona resident and non-resident owners of real estate located in Arizona . . . whether such contact is by mail, telephone, telefax, computer modem or any other means" until Stroman complied with Arizona's licensing law. App. 72a. The Commissioner directed Stroman to comply with Arizona law even in transactions involving no Arizona residents. *Id.*

The Commissioner took no further action until 2005 when it contacted Stroman in Texas by letter demanding compliance with the 2000 order. She asserted that Stroman and its salespeople must obtain Arizona real estate broker's and salesperson's licenses, and comply with all of its laws and regulations if Stroman advertises Arizona-based timeshares on the internet, or conducts activities relating to timeshare resales that involve Arizona based timeshares. App. 64a-66a. The Commissioner purports to limit Stroman's communications with non-residents who have Arizona timeshare interests (App. 65a) and to regulate Stroman's contacts with Arizona residents when the timeshare is located elsewhere. *Id.*

Stroman sought injunctive relief under 42 U.S.C. § 1983 prohibiting the Commissioner's imposition of Arizona real estate licensing laws on Stroman's Texas-based interstate timeshare brokerage business. App.

34a-62a. Stroman alleged that its personal service contracts and brokerage services were governed by Texas law, were performed by Texas licensed real estate agents in Texas, and that the Commissioner's attempted regulation of Stroman's Texas-based business violated the dormant commerce clause. App. 43a, 45a-46a, 58a-62a.

Stroman alleged that the Commissioner had reached into Texas to impose its regulatory scheme on Stroman, not for business Stroman does in Arizona, but for business Stroman does in Texas in interstate commerce. *See* App. 45a-46a, 58a, 61a. Every time a Texas resident calls Stroman about an Arizona timeshare property, Stroman is under threat of penalties for actions taken in Texas. If Stroman enters into its standard registration/advertising agreement, which is a personal service contract, with a Texas resident and the timeshare is in Arizona, the Commissioner claims Stroman is subject to fines and criminal prosecution even though the owner is a Texas resident. *See* App. 47a, 49a, 65a. If Stroman accepts payment for its advertising services without escrowing the funds, Stroman is subject to discipline even when the parties have agreed that their contract will be governed by Texas law. App. 50a. If Stroman's newspaper advertisement or its website is read by an Arizona resident, Stroman faces sanction. App. 50a, 66a.

The Commissioner moved to dismiss the amended complaint arguing that the district court did not have jurisdiction over the Commissioner, that venue was appropriate only in Arizona, and that Stroman's claims were barred by res judicata because Stroman did not contest the Commissioner's 2000 agency order

finding that Arizona's real estate licensing laws applied to Stroman. App. 26a.

The district court dismissed Stroman's case with prejudice finding, sua sponte, that *Burford* abstention[1] barred Stroman's claim. App. 27a-29a. The court likewise found dismissal appropriate based on collateral estoppel. App. 29a-30a.

3. The Decision Below.

The Fifth Circuit affirmed dismissal but on the ground that the district court lacked personal jurisdiction over the Commissioner who sought to impose Arizona law on Stroman in Texas. App. 6a-22a.

The court first discussed the scope of the Texas long-arm statute because 42 U.S.C. § 1983 lacks a provision for service of process. App. 7a-9a. The Texas long-arm statute is coextensive with the limits of due process and provides, *inter alia*, that a nonresident does business in the state if it "commits a tort in whole or in part in this state". Tex. Civ. Prac. & Rem. Code Ann. § 17.042. The Fifth Circuit then considered whether a state official, sued under *Ex parte Young*, was in fact an "individual" within the terms of the long-arm statute where the state "employee's conduct remains state action under the Fourteenth Amendment." App. 7a. The second point that concerned the court was whether Stroman's claim should be classified as a tort where the challenge was against the Commissioner in her official capacity as opposed to a claim against a public official for individual misconduct. App. 8a-9a.

Although the court professed not to consider whether a Section 1983 action should be classified as

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[1] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

a tort under the Texas long-arm statute, (App. 9a), in conducting its due process analysis, the court declined to treat the Commissioner's actions as a tort subjecting her to jurisdiction. Instead, the Court found that even though the official imposes Arizona's regulations onto the citizens of another jurisdiction, those activities do not count as "minimum contacts" sufficient to establish jurisdiction because the Commissioner's conduct was not "commercial" and the Commissioner did not herself derive a benefit from her conduct. App. 11a-13a. The court likewise determined that the tort effects test laid out in *Calder v. Jones*, 465 U.S. 783 (1984) was inapplicable to Section 1983 actions. App. 13a-16a.

Ignoring that Stroman's claim is based not on the interpretation of state law, but whether exertion of extraterritorial control over Texas-based business transactions violates the commerce clause, the court also determined that it would be unreasonable to require the Commissioner to defend her imposition of Arizona law on out-of-state residents in those states, citing the "special expertise" Arizona courts have interpreting Arizona law and federalism concerns. App. 17a-22a.

REASONS FOR GRANTING THE PETITION

When this Court decided *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), it explicitly declined to address the question of personal jurisdiction by a Texas federal court over Idaho state officials in a case alleging violations of the commerce clause and pre-emption. Because the Court found that personal jurisdiction was a "personal privilege[]" rather than an element of subject matter jurisdiction which goes to the power of the Court to hear the case in the first

instance, it was appropriate to decide the issue of venue before reaching personal jurisdiction. *Leroy*, 443 U.S. at 180.

In so doing, the Court noted that the issue of personal jurisdiction over the Idaho state officials was the more difficult question and that "resolution of this question would require the Court to decide a question of constitutional law that it has not heretofore decided." *Id.* at 181. This case puts this question squarely before the Court.

The courts of appeals diverge in the standard to apply in determining when jurisdiction over a foreign state official is warranted. Some apply the standard set out in the long-arm statutes of the forum states. *See Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005). The Ninth Circuit applies an effects test comparable to that laid out in *Calder v. Jones*, 465 U.S. 783 (1984). *See Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995). Others, like the Fifth Circuit here, add additional criteria when the defendant is a public official.

The circuits are likewise divided on the correct due process analysis to apply when the federal litigation is based not on diversity but on federal question jurisdiction. *See United Rope Distrib., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 535 (7th Cir. 1991). A related question is whether any due process analysis applies in the first instance in an official capacity case when the claim is, in actuality, a claim against the state.[2]

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[2] Neither party to the litigation raised this issue below. Both parties agreed that the state official was a person for purposes of the long-arm statute and that state officials' acts constituted a tort. App. 9a. Review by this Court on these grounds is per-

I. The Court Should Grant Review to Establish the Test to Apply in Determining Whether to Exercise Jurisdiction Over Non-Resident State Officials in Section 1983 Actions.

The Fifth Circuit questioned whether it is appropriate to characterize an action against a state official in his official capacity as a tort for purposes of determining the exercise of jurisdiction under the Texas long-arm statute. While the court found that it made sense to treat personal capacity actions as tort, the court indicated that the tort standard for personal jurisdiction should not apply where the action was against a state official in his official capacity. App. 14a, 16a, 18a-19a.

In rejecting *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom., Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), and finding that Texas does not have personal jurisdiction over the Commissioner, the court created a jurisdictional standard unique to state actors in Section 1983 cases. This new standard contradicts the tort standard applied by the Ninth Circuit and discounts officials' contacts with, and the effects of their unconstitutional conduct in, the forum state and applies a heightened minimum contacts test before personal jurisdiction will be considered "reasonable". Whether state officials are entitled to special treatment for jurisdictional purposes in Section 1983 actions is a question of exceptional

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mitted, however, as the larger issue of jurisdiction over a non-resident state official was raised and litigated. *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000).

importance having serious implications for civil rights plaintiffs that should be addressed by the Court.

In *Kidwell*, Great Western, a Texas-based company, made a takeover offer of a company having its principal offices and fifty-percent of its assets in Idaho. Idaho's director of finance asserted that Idaho's takeover statute applied and demanded Great Western make amendments to its disclosure filing and delayed the effective date of the registration and tender offer. Great Western filed suit in Texas to enjoin Idaho from enforcing its takeover laws on interstate cash tender offers for securities traded on the national securities exchange, asserting such enforcement violated the commerce clause and was preempted by federal law.

Finding that Texas properly exercised jurisdiction over the Idaho defendant, *Kidwell* analyzed whether the official established the requisite "'minimum contacts'" with Texas, such that maintenance of the suit did not "offend 'traditional notions of fair play and justice.'" *Kidwell*, 577 F.2d at 1266 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)). Observing that minimum contacts did not require physical activity in the forum state, the *Kidwell* court rejected the Idaho official's argument that its regulatory activity took place in Idaho, pointing out that Idaho's attempt to regulate a Texas company caused Great Western to undertake reasonably foreseeable efforts in Texas to comply with Idaho law, and that such regulation had "substantial consequences on important business plans" that satisfied the "minimum contacts requirement." *Kidwell*, 577 F.2d at 1267. The court observed that the attempted extraterritorial regulation "had the direct effect of stopping a substantial commercial venture based in

Texas" and was analogous to tort cases for intentional interference with commercial relationships. *Id.* at 1268.[3] Further, *Kidwell* recognized that "Idaho's 'business' is to regulate" and by extending Idaho's authority into Texas to affect commercial transactions, "[i]t was conducting that business in Texas." *Id.* Moreover, jurisdiction was appropriate under the Texas long-arm statute, which extends "personal jurisdiction over nonresidents to the limits of due process." *Id.* at 1266.

The Ninth Circuit reached a similar result in *Ziegler*. There, Florida sheriffs used their authority to obtain a warrant to arrest a California resident for grand theft, even though the check upon which the theft charge was based was good. In finding that California had jurisdiction over the Florida officials, the court likened plaintiff's claim under 42 U.S.C. § 1983 to a tort action in applying the jurisdictional analysis.[4] *Ziegler*, 64 F.3d at 474. The court held

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[3] *See also Stroman Realty, Inc. v. Antt*, 20 F. Supp. 2d 1050 (S.D. Tex. 1998). There, the court held that personal jurisdiction over California and Florida real estate agency officials attempting to impose their licensing requirements on Stroman in Texas was proper. "These activities in Texas are not fortuitous or attenuated; they are part of a deliberate effort to exert the officers' authority in Texas." *Antt*, 20 Supp. 2d at 1053. The Florida and California officials have appealed the final judgment entered in Stroman's favor, which is pending in the Court of Appeals for the Fifth Circuit. *Stroman Realty, Inc. v. Simone Marstiller, et al.*, Case No. 05-20803.

[4] Other courts have recognized that actions under 42 U.S.C. § 1983 are torts for jurisdictional purposes. *Dial Up Services, Inc. v. Oregon*, 2007 WL 4200756, at *4 (D. Az. Nov. 27, 2007) (applying the *Calder* effects test and *Ziegler* to declaratory judgment claims against state officials because these "are more akin to tort claims than contract claims."); *Overby v. Johnson*, 418 F. Supp. 471, 472 (E.D. Mich. 1976) (Section 1983 claim is a tort

that although the sheriffs had not physically entered California, they had, in obtaining the arrest warrant, "intentionally directed their actions toward California, for the purpose of having [plaintiff] arrested there and extradited." *Id.* at 475.

The Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984) firmly supports the reasoning in *Kidwell* and *Ziegler*. In *Calder*, the Court held that California had personal jurisdiction over a Florida editor that edited an article in Florida because the "focal point both of the story and of the harm suffered" was California. *Calder*, 465 U.S. at 789. The Court rejected the defendants' proffered analysis under which the forseeability that the article would be circulated in California and have an effect there was insufficient to establish jurisdiction. Instead, unlike the untargeted negligence in a products liability case, the Court determined defendants' "intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* The defendants in that case wrote and edited "an article that they knew would have a potentially devastating impact upon respondent" and that "the brunt of the injury" would be felt by the respondent in California. *Id.* at 789-90. Thus "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida," knowingly cause injury in California. *Id.* at 790. In both *Kidwell* and *Calder*, then, jurisdiction in tort cases was established where the defendants' tortious activity was directed to and caused injury in the forum state.

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within Michigan long-arm statute); *Maney v. Ratcliff*, 399 F. Supp. 760, 766 (D. Wis. 1975) (stating that action under Section 1983 "should be read against a background of tort liability.").

Courts apply *Calder*'s 'effects test' to establish whether a tort defendant has "purposefully availed" himself of conducting business in the forum state. A tortfeasor thus has minimum contacts with a state if he performs acts directed at the forum state which cause harm that the defendant should have anticipated would be suffered there. *Ziegler*, 64 F.3d at 474.[6] The 'purposeful availment' prong in tort cases differs from that in many non-tort cases, where as part of a separate test the defendant derives "'the benefits and protections' of the forum's laws" or creates "'continuing obligations' between himself and residents of the forum". *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). In the case of Texas, the long-arm statute provides for jurisdiction where the defendant "commits a tort in whole or in part" in the state. Tex. Civ. Prac. & Rem. Code § 17.042. It does not require that the tortfeasor also do business in the state. *See id.*

Courts appear to have no trouble applying *Calder* in cases involving defendants who are not public officials. *See Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997). In *Janmark*, the court found Illinois' jurisdiction over a California defendant proper where

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[6] *See also Taylor v. Phelan*, 912 F.2d 429, 433 (10th Cir. 1990) (finding in Section 1983 action that Kansas had jurisdiction over a Missouri police officer who gave assurances to Kansas residents they would be safe from harm and over Missouri Police Department where officer informed Kansas criminal suspect warrant had been issued when officer did not have ability to arrest); *Lee v. City of Los Angeles*, 250 F.3d 668, 692-94 (9th Cir. 2001) (holding that New York police officers were subject to California's jurisdiction in Section 1983 action arising out of wrongful extradition of California resident).

defendant called plaintiff's customer in New Jersey, causing the customer to cancel an order pending in Illinois. The court observed that "[t]here is no tort without injury . . . and the state in which the injury (and therefore the tort) occurs may require the wrongdoer to answer for its deeds even if events were put in train outside its borders." *Janmark*, 132 F.3d at 1202. Further, Illinois had "extended its long-arm power to the limit allowed by the Constitution" and "[t]here can be no serious doubt after [*Calder*] that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." *See also Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006) (finding that in declaratory judgment action, California had personal jurisdiction over French associations that obtained orders in France purporting to govern California-based plaintiff's conduct in California, even though effect sought by the French court would be felt in France); *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1073 (10th Cir. 2008) (finding personal jurisdiction over nonresident defendant proper in Colorado where defendant sent letter to eBay in California intended to invoke procedures that would stop plaintiffs' auction).

This Court has never held that a different standard should apply merely because a state official exerts unconstitutional regulatory authority versus committing some other variety of tort. Indeed, no basis exists for requiring greater forum contacts by a state official than from other defendants merely because the official purports to enforce his state's regulatory intent. As *Kidwell* observed, a state official exercising his authority in violation of federal law and inflicting damage on a plaintiff in another state acts in the same manner as a private defendant who

interferes with contracts in the forum state, even when the defendant does not physically act in that state. *Kidwell*, 577 F.2d at 1268. Further, as Justice Stevens has noted, unconstitutional conduct by a state official causes him to become a "tort-feasor". *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (Stevens, J., dissenting). Whether the defendant is a state official acting beyond his regulatory power or another tort defendant directing harm to residents of another state is a distinction without a difference; both are unlawful.

The Fifth Circuit's new standard also has no basis in the Texas long-arm statute and imposes a heightened version of *Calder* requiring that such defendants direct their tortious conduct to the plaintiff's state *and* benefit either financially or from the forum state's laws before jurisdiction is found. *See* App. 11a (stating that although "the Commissioner has 'reached out' to assert her authority" over Stroman, "she has not 'purposefully availed' herself of the benefits of Texas law like someone actually 'doing business' in Texas.").[6]

The Sixth Circuit has adopted a similar "economic" criterion. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177 (6th Cir. 1992) (finding that Michigan did not have jurisdiction over state officials from Nevada, Washington and South Carolina who directed conduct to Michigan that denied Michigan waste genera-

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[6] *See also* App. 13a (stating that "the Commissioner was not engaged in commercial transactions to obtain a commercial benefit by acting in a governmental capacity to enforce Arizona law. Because no such benefit accrues to the Commissioner from her activities relating to Texas, any jurisdiction based upon her having caused an 'effect' in Texas is likewise misplaced.").

tors access to disposal facilities in part because "[t]he defendants' states have undertaken no economic activity in the state of Michigan in relation to the disposal sites."). However, although both the Fifth and Sixth Circuits utilized economic benefit as a test for determining jurisdiction over these state officials, neither the Texas long-arm statute nor Michigan's includes that as a prerequisite for jurisdiction in tort cases. *See* Tex. Civ. Prac. & Rem. Code § 17.042; Mich Comp. Laws § 600.705(2) (providing for specific jurisdiction based on "[t]he doing or causing an act to be done, *or consequences to occur*, in the state resulting in an action for tort.") (emphasis added). Yet these circuits have opted to restrict jurisdiction ordinarily permitted under state long-arm statutes and this Court's principles espoused under *Calder*.

Imposing additional criteria before jurisdiction over state officials can be found is also in conflict with cases from the Second Circuit such as *Grand River*.[7] In *Grand River*, cigarette manufacturers brought suit in New York against attorneys general of other states, alleging that those states' statutes requiring the manufacturers to create escrow accounts as security against future cigarette-related claims were unconstitutional and violated other federal provisions. Enactment of the escrow statutes was a term

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[7] *See also Maney*, 399 F. Supp. at 767 (rejecting Louisiana police officers' claim that their Wisconsin contacts "were initiated for the purpose of enforcing Louisiana's criminal laws rather than for the defendants' economic self-benefit", stating that "nothing in the [Wisconsin] long-arm statute makes the motive for a defendant's activities determinative of the statute's application. If the defendants' actions fall within the language of the long-arm statute, and if they constitute sufficient 'minimum contacts' . . . then personal jurisdiction may be exercised over them.").

in a settlement agreement reached with other cigarette manufacturers that happened to be negotiated in New York. However, the manufacturers that were parties to the settlement agreement were not parties to the New York lawsuit, nor were the parties to the New York lawsuit participants in the settlement agreement. The Second Circuit upheld the district court's finding that New York had jurisdiction because the attorneys general negotiated the settlement agreement in New York. The court relied on the New York long-arm statute, which permitted jurisdiction where the defendant "'transacts any business within the state'". *Grand River*, 425 F.3d at 166 (citation omitted).[8] Observing that the long-arm statute's transacting business provision could "'be used for a contract of a non-commercial nature,'" the court saw "no reason why the negotiation and execution of the Master Settlement Agreement should be viewed any differently than an ordinary commercial contract" and did not impose any requirement that the state officials benefit financially from the transaction. *Id.* at 167 (citation omitted). Thus, plaintiffs could bring action in New York against those state officials for claims arising out of those states' adoption of the Master Settlement Agreement and escrow statutes when the criteria under the New York long-arm statute was met. *Id.* *See also Kronisch v. United States*, 150 F.3d 112, 130-31 (2d Cir. 1998). Moreover, because the court determined the long-arm statute's "transacts any business" test had been met, the court saw no need to determine

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[8] Unlike the Texas long-arm statute, the New York statute does not extend to the limits of due process and therefore provides a narrower basis for personal jurisdiction. *See Best Lines, Inc. v. Walker*, 490 F.3d 239, 244 (2d Cir. 2007).

whether jurisdiction was also proper under the specific tort provision of the statute. *See Grand River*, 425 F.3d at 166 n. 2.

While commercial benefit may characterize many cases where the courts have found personal jurisdiction, its absence is by no means a limiting factor, particularly in a tort-type case. The Fifth and Sixth Circuits' imposition of this additional criterion in assessing jurisdiction over public officials is in conflict with the positions of the Second and Ninth. This Court should resolve this difference and provide necessary guidance to the federal courts on this issue. In contrast to the Fifth and Sixth Circuits' standards, *Calder* did not impose any requirement that a tort defendant benefit either financially or from the laws of the forum state. Indeed, in *Calder*, the Court rejected the Florida defendants' claims that they were immune from jurisdiction in California because they had no economic stake in the newspaper's sales in California. *Calder*, 465 U.S. at 790. Limiting jurisdiction in a case arising from a state official's unconstitutional attempt to regulate beyond his authority based on the absence of a personal commercial benefit abrogates the tort test of personal jurisdiction.[9]

Further, although courts, including the Fifth Circuit here, have justified a heightened standard for state officials based on the possibility that officials could be called to defend their actions nationwide,

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[9] Importantly, where a defendant "purposefully has directed his activities at forum residents", he must present a "compelling case" that other factors render jurisdiction unreasonable and "[m]ost such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional." *Burger King Corp.*, 471 U.S. at 477.

App. 16a, that is not a sound basis for altering the jurisdictional analysis applied to government official defendants. Indeed, *Kidwell* rejected the argument that allowing jurisdiction would subject state officials to countless out-of-state lawsuits, noting that, in most cases, the official's attempted enforcement of state laws only applies to transactions and individuals in those states. *Kidwell*, 577 F.2d at 1270. The possibility of maintaining a defense out-of-state arises *only* when the official is alleged to act beyond his authority and tortiously cause injury to a plaintiff in another jurisdiction.

There is nothing inappropriate in compelling a state to answer for wrongs it committed in a foreign jurisdiction in that state. *See Nevada v. Hall*, 440 U.S. 410 (1979) (proper to sue Nevada in California court for tort committed in California and rejecting Nevada's arguments that sovereignty and comity precluded it from being hauled into California's court system); *see also Head v. Platte County, Mo.*, 242 Kan. 442, 448, 749 P.2d 6, 10 (1988) (holding that sovereign immunity did not bar suit brought by Kansas resident against Missouri county and sheriff for claims arising out of negligently issued arrest warrant because "a sister state is sovereign only within its own boundaries, and its immunity laws have no extraterritorial force.").

Furthermore, when one state attempts to regulate activity outside its borders and within the boundaries of another state, it is reasonable for the courts in the other state to exercise jurisdiction over the state which is regulating the activity. *See St. Croix Waterway Ass'n v. Meyer*, 942 F. Supp. 435, 440-41 (D. Minn. 1996) (Minnesota resident was able to compel Wisconsin official to defend a constitutional

attack on the regulations in Minnesota); *In re Dairy Mart Conv. Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (rejecting Kentucky official's claim of sovereign immunity finding that the exercise of jurisdiction in New York over Kentucky state officials proper under the *Ex parte Young* exception, noting that the state cannot authorize an unconstitutional act).

Presumptively excusing state officials from answering for their *ultra vires* conduct in the forum state creates a dangerous imbalance of power between the official and the targets of the official's improper exercise of authority.[10] As did the Commissioner in this case, a state official could institute administrative proceedings from afar purporting to regulate contractual relations and business activity wholly outside the official's jurisdiction for the mere cost of postage needed to send its decrees to the plaintiff's state. The target of such invalid exercise of authority then has little choice but to comply with the foreign state official's demands, face the possibility of penalties from the foreign state (and possibly his own if the official seeks the home state's assistance in enforcing a resulting judgment), or travel to the official's home state to contest the official's actions there. Given the ease with which a state official may exert his authority, the burden of defending that action properly lies with the one who enjoys the backing of his home state rather than the individual who is the target of

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[10] Any assertion that the official is authorized to exercise his authority or did not cause the harm alleged goes to the merits of the case, not the jurisdictional analysis. *See Griepentrog*, 954 F.2d at 1178 (Suhrheinrich, J., dissenting) (observing that "[c]ollapsing the jurisdictional and substantive inquiries creates an artificial bar to [plaintiff's] ability to litigate in Michigan.").

the regulatory overreaching. *See Kidwell*, 577 F.2d at 1269.

Moreover, in such cases, the plaintiff's state certainly has an interest in protecting its citizens from the conduct of state officials improperly imposing their power on conduct within the state. *See Burger King Corp.*, 471 U.S. at 473 (observing that states have a "'manifest interest'" in providing its residents with a convenient forum for redressing injuries by out-of-state actors") (citation omitted).

Although the Fifth Circuit suggested the states would "lose[] the benefit of having [its] laws examined" by local courts that presumably have "special expertise" interpreting those laws, this is not a legitimate basis to deny personal jurisdiction over the state official. App. 17a. To do so would go beyond accepted principles of comity - it would elevate the interests of one state above those of another on grounds of sovereignty. *See, e.g., Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 496-97 (2003) (rejecting California's claim that "core sovereignty" interests required Nevada to give full faith and credit to California's law immunizing the Franchise Board from suit; Nevada could apply its more relaxed immunity statute); *In re Dairy Mart Conv. Stores, Inc.*, *supra*.

State sovereignty is not impugned by permitting the exercise of personal jurisdiction over a state official who violates federal law. Given that sovereign immunity is expressly waived to permit an individual to bring suit to enjoin the unconstitutional acts of state officers, sovereignty can hardly serve as a basis to defeat jurisdiction. The plaintiff's federal forum is just as capable of determining federal constitutional

issues as a federal court in another state. *See Antt*, 20 F. Supp. 2d at 1053.

When a federal constitutional violation is alleged to be based on official unconstitutional application of state law, it is inappropriate to apply criteria other than that set forth in the forum state's long-arm statute and this Court's decision in *Calder*. There is no support in this Court's decisions for affording extra-jurisdictional protection to such state official defendants. The Court should resolve the disagreement among the circuits on the proper standard to apply in analyzing the exercise of jurisdiction over public officials.

II. This Court Should Grant Review to Settle the Issue of Which Due Process Analysis Applies When the Criteria of the Forum's Long-arm Statute Are Met but the Issue Involves a Federal Question.

The federal courts have typically applied the minimum contacts test from the Fourteenth Amendment in assessing jurisdiction over state officials in Section 1983 actions. There is disagreement among the circuits, however, whether a Fourteenth Amendment due process test or a Fifth Amendment test applies in a federal question case. Some courts have asserted that the Court in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987) reached that issue. *See* n.14, *infra*. It did not, and it remains an open question, particularly in light of subsequent amendments to Rule 4. The Court's determination of this important question is appropriate.

In *Omni*, the Court held that where the federal statute does not set forth service of process criteria, the federal courts must look to the law of the forum

state to determine whether personal jurisdiction can be asserted over a defendant. *Omni*, 484 U.S. at 106. In addition to due process requirements and notice requirements, the Court held that "[t]here also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." *Id.* at 104. The Court looked to then Fed. R. Civ. P. 4(e) and (f) and found that service could not be effected on foreign nationals because the provisions of the long-arm statute of the forum state had not been met and the plaintiff conceded that point. *Id.* at 111.[11] Although the case involved a federal question, the Court nonetheless required application of the state's long-arm statute to determine whether personal jurisdiction could be established in the federal forum. *Id.* at 104. The Court did not address whether the Fourteenth or the Fifth Amendment due process analysis would apply.

Like the federal statute at issue in *Omni Capital*, Section 1983 lacks a provision for nationwide service of process. Accordingly, the federal district court must look to the long-arm statute of the state in which it sits to determine whether it can exercise personal jurisdiction over the defendant. Fed. R. Civ.

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[11] Fed. R. Civ. P. 4(f) permitted service "'when authorized by . . . these rules, beyond the territorial limits of that state.'" *See Omni*, 484 U.S. at 104 n.7 (quoting Rule). This section in turn required reference to Rule 4(e) which provided: "'[w]henever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, . . . upon a party not . . . found within the state . . . service may be made under the circumstances and in the manner prescribed in the statute or rule.'" *Omni*, 484 U.S. at 105 n.8 (quoting Fed. R. Civ. P. 4(e) (second and fourth alteration in original).

P. 4(k)(1)(A).[12] As set forth above, the Texas long-arm statute, unlike the Louisiana statute at issue in *Omni*, provides for jurisdiction in a case where a tort is committed in whole or in part in Texas. There are no other statutory criteria for the exercise of long-arm jurisdiction in a case involving a tort. The question here is which type of due process analysis is required where the criteria of the long-arm statute are met in a federal question case. There is split in the circuits on this issue.

In *Handley v. Indiana & Michigan Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984), the court considered the question of whether personal jurisdiction over a non-resident defendant in a federal question case existed where the long-arm criteria of the forum state had been met.[13] Recognizing that Rule 4 and the forum state's long-arm statute governed jurisdiction even in federal question cases, the court noted the distinction between diversity cases and federal question cases for purposes of the due process clause.

> As part of a national system of courts a federal district court considering a case that arises under federal law is not subject to precisely the

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[12] Fed. R. Civ. P. 4(k) now sets forth the applicable provisions governing the "territorial limits on service" on non-resident defendants. It provides that personal jurisdiction is established over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). The language "under the circumstances and in the manner provided" was eliminated by the 1993 amendments.

[13] The Court granted certiorari in *Omni* based on a "potential conflict" between *Handley* and *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986) (en banc). *Omni Capital*, 484 U.S. at 102.

> same due process limitations which restrict its reach in diversity cases.

Id. at 1268. With respect to a federal claim, the court observed:

> When a court, state or federal, adjudicates a federal claim, the federalism issue is of no relevance, for the court determines the parties' rights and liabilities under uniform, national law. No state intrudes on another's interest. The only relevant interest is the national one.

Id. at 1269. The court proceeded to determine that service was properly effected under the Kentucky long-arm statute and, relying on *World-Wide Volkswagon v. Woodson*, 444 U.S. 286 (1980), noted that "[w]hen a federal court is hearing and deciding a federal question case there are no problems of 'co-equal sovereigns.' That is a Fourteenth Amendment concern which is not present in actions founded on federal substantive law." *Handley*, 732 F.2d at 1271. The court's due process analysis was thus limited to whether the forum was inconvenient. *Id.*; *see also Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 422-23 (5th Cir. 1986) (but noting that "[a] heavy weight of authority, however, accepts the anomaly.") (citation omitted), *aff'd sub nom. Omni*, 484 U.S. 97.

The Fifth Circuit in *Point Landing* criticized *Handley*, claiming that it invoked the long-arm statute but asserted jurisdiction over a defendant not subject to the jurisdiction of Kentucky courts. *Point Landing*, 795 F.2d at 426. That is simply inaccurate. Moreover, the Court in *Omni* did not negate the reasoning of *Handley* nor does the subsequent amendment to Rule 4 affect it either. In contrast to *Omni*, the defendant in *Handley* was not a foreign national

and was subject to jurisdiction under Kentucky's long-arm statute. *Omni* resolved the question of whether a state's long-arm statute properly provided the rule for assessing personal jurisdiction in both diversity and federal question cases. The Court's ruling in *Omni* leaves the reasoning in *Handley* with respect to the due process analysis intact.

The Seventh Circuit's decision in *United Rope Distrib., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532 (7th Cir. 1991), decided well after *Omni*, found *Handley's* reasoning persuasive. The Seventh Circuit disavowed the majority view which found that the language in old Rule 4, "under the circumstances" meant that "when assessing the constitutionality of an assertion of personal jurisdiction the federal court must pretend that it is a state court even when the issue arises under federal law." *United Rope*, 930 F.2d at 535 (citing cases from the Third, Fifth, Sixth, Ninth, and Eleventh circuits).

The court sided with the minority view set forth in *Handley*:

> When the state law authorizes this service . . . the federal court has jurisdiction unless the Constitution bars the door. Whether it does depends on all of the circumstances of the case—not only the defendant's activities, but also the fact that the court is exercising national power.

Id. at 536. Ultimately, *United Rope* did not reach the question because the appellants sought the creation of a federal common law basis for national service of process which had been expressly rejected by the Court in *Omni*. *Id.*[14]

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[14] Subsequent decisions have misread *United Rope* and the Court's decision in *Omni*. *See, e.g., L.H. Carbide Corp. v. The*

The due process issue remains unresolved. The court in *Chew v. Dietrich*, 143 F.3d 24 (2d Cir. 1998) acknowledges that the 1993 amendment to Rule 4 deleted "the language 'under the circumstances,' which had been critical to the *majority view* analysis of Rule 4(e)". *Chew*, 143 F.3d at 28 n.3 (emphasis added). Thus, with the elimination of this language, the minority view expressed in *Handley* and *United Rope* should be adopted. "Given the nature of the changes to Rule 4, a strong argument can be made that even where service is made under the forum state's long-arm statute, a federal court may exercise personal jurisdiction as long as such exercise is consistent with the Fifth Amendment due process standard." *Chew*, 143 F.3d at 28 n.3. This case presents the Court with the opportunity to answer the question left open in *Omni* and to resolve the dispute among the circuits on this question.

III. The Court Has Never Addressed Whether the Due Process Clause Applies in the First Instance In a Case Against a Public Official in His Official Capacity.

A related question is whether a due process analysis should apply at all when a case is, in actuality, one against the state. The Court in *Ex parte Young*, 209 U.S. 123 (1908) affirmed the parameters under which a party could seek judicial relief for uncon-

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Piece Maker Co., 852 F. Supp. 1425 (N.D. Ind. 1994) (referring throughout to "implicit" rulings by *Omni*, *United Rope*, and "implicit" amendments to Rule 4). The district court in that case missed that the plaintiff in *Omni* did not contest the lack of service of process under the long-arm statute of the forum state in that case and misstates the holding. *See L.H. Carbide Corp.*, 852 F. Supp. at 1430-31.

stitutional acts arising from official policy. While an action directly against the State is prohibited under the Eleventh Amendment, the Court permitted an action for injunctive relief against state officials "who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature" where those acts are alleged to violate the Federal Constitution. *Young*, 209 U.S. at 155-56. The state official is therefore stripped of sovereign immunity and subject to suit for prospective injunctive relief.

Such suits are, however, in actuality claims against the state and the Court has recognized the "'irony' in the fact that 'an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment' but does not under the Eleventh Amendment.'" *Pennhurst State Sch. & Hosp.*, 465 U.S. at 105 (1984) (citation omitted). It does not necessarily follow, however, that the exercise of personal jurisdiction over the state by the federal court should be analyzed under the Fourteenth Amendment.[15]

Personal jurisdiction is "an individual liberty interest" and derives from the due process clause. *Ins. Corp. of Ireland v. Compagnie des Bauxites de*

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[15] As Justice Stevens remarked in *Fed. Maritime Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743 (2002), the *Chisholm v. Georgia*, 2 Dall. 419 (1793) decision to which the Eleventh Amendment was enacted in response, had two jurisdictional components, one of which was the issue of personal jurisdiction over a state defendant. *Fed. Maritime*, 535 U.S. at 770 (Stevens, J., dissenting). Further, the Eleventh Amendment did not obviate the *Chisholm* court's "personal jurisdiction holding: that the Constitution does not immunize States from a federal court's process." *Id.* at 772 (Stevens, J., dissenting).

Guinee, 456 U.S. 694, 702 (1982) (holding that personal jurisdiction may be ordered as a sanction; personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."). *Id.* (footnote omitted.)[16] States, as such, however, have no due process rights. *See State of South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."). Given that the due process clause forms the foundation for the minimum contacts test, the application of this test in a Section 1983 action against a state official in his official capacity should have no application in the first instance as such claims are permitted claims against the state. "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is not a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted) (alteration in the original).

Thus, the district court in *In re Reserves Dev. Corp. v. Browning*, 64 B.R. 694 (W.D. Mo. 1986) held that no minimum contacts analysis was required prior to the bankruptcy court's exercise of jurisdiction over state officials of West Virginia because "a state is not

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[16] In contrast, personal jurisdiction requirements, when applied to state courts, "reflects an element of federalism and the character of state sovereignty vis-à-vis other States." *Compagnie des Bauxites*, 456 U.S. at 702 n.10.

a 'person' under the 5th Amendment." *Citing Katzenbach*, 383 U.S. at 323 (quotation omitted). The court noted that "a suit against defendants in their official capacity is a suit against the state, and the Supreme Court has held that a state does not have standing 'as parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen.'" *Citing Katzenbach*, 383 U.S. at 324.

In *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995), however, the court concluded that if the official were treated as a state, the language of the District of Columbia long-arm statute would not permit jurisdiction.[17] *Ferrara*, 54 F.3d at 831-32. In so holding, however, the court failed to acknowledge the fact that a state official when "sued for injunctive relief" is treated as a person.[18] It would make no sense to

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[17] In *Ferrara*, the court found jurisdiction over the New Mexico official lacking, holding that plaintiff failed to give "due consideration of [the] pre-existing relationship" between the New Mexico Supreme Court and the licensee in which New Mexico retained the right to discipline the licensee and the licensee was specifically subject to the Board's authority. *Ferrara*, 54 F.3d at 829-30. Further, the Board was not setting standards for or directing the behavior of prosecutors in the District of Columbia. *Id.* at 330. In contrast, in this case there is no "pre-existing relationship" between Stroman and the Commissioner and certainly no agreement by Stroman that it would be subject to Arizona's authority for acts Stroman conducts in Texas. Moreover, unlike, the defendant in *Ferrara*, the Commissioner is absolutely directing "how [brokerage transactions are] to be conducted" in Texas. *Id.* at 828.

[18] The issue gave the Fifth Circuit pause but it did not address the issue. *See* App. 7a-8a ("[w]hether the long-arm statute's definition of nonresidents ignores or subsumes the *Ex parte Young* fiction is uncertain."). The parties conceded that

adopt the fiction of *Ex parte Young* for the purpose of arresting unlawful conduct by state officials in their official capacities and then refuse jurisdiction because the action is against the State. The federal courts have a long-standing directive to exercise jurisdiction over claims against state officials whose conduct violates the federal constitution. *See, e.g., Home Tele. & Tele. Co. v. Los Angeles*, 227 U.S. 278 (1913). To revoke the fiction for purposes of long-arm jurisdiction would obviate that goal. The question for the Court to answer is how far that fiction extends.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 5, 2008

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the Commissioner was a "person" for purposes of the long-arm statute. App. 9a.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed January 11, 2008]

No. 06-20095

STROMAN REALTY, INC.,
Plaintiff-Appellant,

v.

SAM WERCINSKI, Commissioner of the Department of Real Estate for the State of Arizona,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before JONES, *Chief Judge*, and WIENER and BARKSDALE, *Circuit Judges*. EDITH H. JONES, *Chief Judge*:

Stroman Realty, Inc. ("Stroman"), a Texas-based company, sought relief in a Texas federal court from attempts by the Commissioner of the Arizona Department of Real Estate to exercise regulatory authority over Stroman's timeshare sales business. The district court dismissed its action, which alleged violations of the Commerce Clause under 42 U.S.C. § 1983. Because the federal district court in Texas lacked personal jurisdiction over the defendant, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Stroman is one of the nation's largest advertisers and resale brokers of timeshare intervals in the secondary resale market. It advertises properties to individuals interested in either selling their timeshare interests or purchasing timeshares from a previous owner other than the vacation resorts or condominium developers. Stroman's sole place of business is located in Conroe, Texas. Its brokers are licensed by the Texas Real Estate Commission, and the advertising and marketing agreements they negotiate with Stroman's clients are governed by Texas law.

Because most timeshare buyers do not live in the state in which their desired property is located, Stroman advertises in national newspapers, trade magazines, through direct-mail publications, and over the Internet. Prospective purchasers can search Stroman's website for availabilities at condominiums, resorts, or spas, and read about the occupancy conditions of the various timeshare intervals being offered. Interested parties then submit bids through the website or call a Stroman broker. Stroman uses its computer database to match prospective buyers with such variables as location, price range, amenities, and use interval. Prospective sellers are required to pay a one-time $489.00 "advance advertising fee" to register their timeshares with Stroman's Internet database, and, upon sale, the seller pays Stroman an additional $750.00 or 10% of the total sale price—whichever is greater—as commission. Often, the seller, prospective buyer, and timeshare property involved in a single deal are all located in different states. It would thus not be unusual for Stroman to broker a transaction

involving a Texas buyer and an Arizona seller of a two-week timeshare interval at a Hawaii resort.

In January 2000, Elaine Richardson, Commissioner of the Arizona Department of Real Estate ("Commissioner"),[1] sent Stroman by certified mail a Cease-and-Desist Order ("Order") stating that Stroman's agents were not licensed as real estate brokers or salespeople in Arizona. Under Arizona law, nonresident brokers and other real estate service providers who transact business involving either Arizona citizens or real property located in Arizona must be licensed by the Commissioner whether or not the timeshare property the Arizona citizen wishes to buy or sell is located in Arizona. See ARIZ. REV. STAT. §§ 32-2101 (47) (b)—(j); 32-2125.02. Nonresident brokers like Stroman are subject to various administrative and record-keeping requirements, such as maintaining in-state escrow accounts, hard copies of earnest-money receipts, closing statements, and other business records. *See, e.g., id.* §§ 32-2125.02, 32-2151.01. Unlicensed brokering of transactions involving Arizona real property or timeshares is a "Class 6 felony," punishable by fine or up to two years' imprisonment. *See id.* § 32-2165(A).

The Commissioner's Order maintained that Stroman and its agents were engaging in unlicensed timeshare resale brokering and ordered Stroman to cease "all contact with Arizona resident and nonresident owners of real estate located in Arizona . . . by mail, telephone, telefax, computer modem or

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[1] Sam Wercinski, who replaced Elaine Richardson as Commissioner on January 11, 2007, is automatically substituted as the Defendant-Appellee in this matter. See FED. R. Civ. P. 25(d)(1).

any other means" until it complied with Arizona's licensing laws.[2] Additionally, Stroman was instructed to refund "all monies solicited from Arizona resident and non-resident owners of real estate" received in the course of Stroman's allegedly illicit brokerage transactions. The Order stated that Stroman had the right to invoke an administrative review procedure and that failure to file a notice of appeal within thirty

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[2] In support of the Order, the Commissioner referenced five unlicensed timeshare resale transactions involving Stroman and Arizona residents or real property:

1. An Arizona timeshare broker filed a complaint averring that he received an advertisement from Stroman, in violation of Arizona law, soliciting the sale of his Arizona timeshare interests stating: "Dear All Seasons Resorts Inc Would (sic) you be willing to sell your Timeshare Property for cash? Call Today: TOLL FREE 1-800-829-1544";

2. A Stroman agent drafted contracts on behalf of Arizona resident-sellers for purchase of two Sedona, Arizona, timeshare intervals. The sellers learned about Stroman through direct-mail and via the Internet;

3. An Arizona resident filed a complaint stating that he paid Stroman a $489.00 advertising fee and entered into a listing agreement for the sale of a Las Vegas, Nevada, timeshare interval, but that Stroman failed to provide him with any examples of advertisements or prospects for the resale of the timeshare;

4. An Arizona resident contracted with Stroman and paid a $489.00 advertising fee for sale of her Olympic Village, California, timeshare and paid two more $489.00 fees for listings of two Vail, Colorado, timeshares, but that since listing with Stroman she has heard nothing about the status of the properties;

5. An Arizona resident informed the Department that she had received "many" Stroman mailings soliciting resale of her Scottsdale, Arizona, timeshare.

days of service of process would constitute waiver of any future right to administrative or judicial appeal. *See id.* § 41-1092. Stroman did not respond. Pursuant to Arizona law, the Order thus became a final, nonappealable, administrative decision. *See id.* § 12-902(B).

For five years, the Commissioner took no action, and Stroman—undeterred by the Order—continued to broker transactions involving Arizona timeshares and residents. In March 2005, however, the Commissioner contacted Stroman by mail, ordering anew that it cease its Arizona-related brokerage activities. This time around, the Commissioner added a charge that Arizona real-estate law forbade advertisement of Arizona properties on Stroman's Internet website. *See id.* § 32-2163(D). In response, on April 8, 2005, Stroman filed a complaint in the Southern District of Texas seeking declaratory and injunctive relief against the Commissioner under 42 U.S.C. § 1983, alleging that Arizona's attempted exercise of regulatory jurisdiction to license timeshare resales violated the Commerce Clause by discriminatorily and unduly burdening nonresident participation in the interstate secondary timeshare market.

The Commissioner then moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b), arguing that: (1) the Arizona administrative proceeding rendered Stroman's § 1983 claim res judicata; (2) the district court lacked personal jurisdiction over her; and (3) venue was improper. The Commissioner also moved for summary judgment on the statute of limitations. The district court granted the Commissioner's motion to dismiss based on claim preclusion and—raising the issue sua sponte—abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The

district court did not address the other issues. Stroman has appealed.

DISCUSSION

Personal Jurisdiction

Why the district court failed to consider personal jurisdiction over the Commissioner in a Texas federal court is unclear. This court must do so.[3] Because the district court dismissed without the benefit of an evidentiary hearing, Stroman need make only a prima facie showing that jurisdiction is proper. *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 650 (5th Cir. 2004) (citation omitted). We accept as true Stroman's uncontroverted allegations and construe all record evidence in its favor. *Id.*

Because 42 U.S.C. § 1983 lacks a provision for service of process,[4] federal courts adopt state jurisdictional statutes to reach out-of-state defendants. *See* FED. R. CIV. P. 4(e), (k); *Point Landing, Inc. v. Omni Capital Inn, Ltd.*, 795 F.2d 415, 419 (5th Cir. 1986), *aff'd sub nom. Omni Capital Inn, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987). The Texas long-arm statute is coextensive with the federal constitutional limits of due process and normally generates an inquiry limited to the scope of the Fourteenth Amendment's Due Process Clause. *See Religious Tech. Ctr. v. Liebreich*, 339 F.3d 369, 373 (5th Cir. 2003). But where, as here, the case involves a challenge to an out-of-state regulator's enforcement

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[3] Because we hold that the court lacked personal jurisdiction over the Commissioner, we decline to reach the other issues argued on appeal. *See* FED. R. CIV. P. 12(b) (4) (lack of personal jurisdiction over defendant allows case to be dismissed).

[4] *See* 42 U.S.C. § 1983; *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1269 (5th Cir.1983).

of her state's statute, rather than a conventional contract or tort claim, it is useful to consider first whether the Texas long-arm statute reaches the Commissioner.

A. Texas long-arm statute

Pertinent here, the Texas long-arm statute states:

> In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:
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> (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; [or]
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> (2) commits a tort in whole or in part in this state; . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042. "'[N]on-resident' includes: (1) an individual who is not a resident of this state; and (2) a foreign corporation, joint-stock company, association, or partnership." TEX. CIV. PRAC. & REM. CODE ANN. § 17.041.

One question arising from this language is whether the Commissioner, sued under the fiction created by *Ex Parte Young*, 209 U.S. 123 (1908), is an "individual" defendant within the terms of the statute. *Ex Parte Young* subjects a state employee acting in her official capacity to suits for prospective relief that avoid the Eleventh Amendment bar, but the employee's conduct remains state action under the Fourteenth Amendment. 17A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4231 (3d ed. 2004); *see also Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 287-88 (1913). Although the Commissioner is an "individual," she is acting in and was sued in her official capacity for

enforcing Arizona statutes. Whatever may be the case for § 1983 suits against sister-state officials who are sued in their individual capacity, the Texas statute offers no obvious rationale for including nonresident individuals sued solely in their official capacity under *Ex Parte Young*. Moreover, the only other class of nonresident defined by the statute includes business entities but not fellow states. Whether the long-arm statute's definition of nonresidents ignores or subsumes the *Ex Parte Young* fiction is uncertain.

A second statutory question is whether the Commissioner's enforcement of Arizona regulations constitutes "doing business," making a contract, or committing a tort—the activities reached by the long-arm statute. The parties, pursuing a commonly used broad analogy between § 1983 suits and torts, characterize this suit as a tort claim. It is one thing to appropriate statutes of limitation and damage measures from tort causes of action into § 1983; these are practical, utilitarian decisions. It also seems normally accurate to describe as torts, even under the long-arm statute, § 1983 suits against public officials for individual misconduct. But the claim here is against the Commissioner in her official capacity, the essence of Ex Parte Young.[5] The parties may casually describe this case as a tort, even though it challenges not the Commissioner's abuse of power but her faithful enforcement of allegedly unconstitutional Arizona statutes, and it seeks not damages but an injunction against the statute's operation. This court, however, interpreted similar official conduct as the "business" of state regulation. *See Great W. United*

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[5] *See* Erwin Chemerinsky, *Federal Jurisdiction* § 7.5.1 (4th ed. 2003) (describing *Young*).

Corp. v. Kidwell, 577 F.2d 1256, 1268 (5th Cir. 1978), rev'd on other grounds sub nom. *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).[6] These two competing approaches suggest that only by twisting the ordinary meaning of the terms covered by the long-arm statute is Arizona's regulatory activity intended to be encompassed and adjudicated in Texas courts.

By conceding the application of the "tort" provision of the long-arm statute, the Commissioner relieves this court of an obligation to pursue these interpretive questions. We preserve them for posterity, noting that while there may be no constitutional impediment against Texas's decision to allow its courts to construe and perhaps overturn state officials' enforcement of sister state statutes,[7] and while the long-arm statute is coextensive with the limits of procedural due process for those people and entities and activities that it describes, the legislature may not have opened the courthouse doors to include this case.

B. Due Process

Whether or not the Texas long-arm statute encompasses extraterritorial regulation by a nonresident state official, we hold that exercising personal jur-

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[6] Although the Texas Supreme Court supports an expansive construction of "doing business," it connects acts relevant to the long-arm statute with a "business enterprise." *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). And a "business" is in common usage a "commercial enterprise carried on for profit." *Black's Law Dictionary* 211 (8th ed. 2004). Arizona's regulatory activity in no way meets this definition.

[7] *See Nevada v. Hall*, 440 U.S. 410 (1979) (no constitutional impediment to a suit for damages against the State of Nevada being litigated in California court).

isdiction over the Commissioner in the Southern District of Texas would violate due process.[8] The Due Process Clause of the Fourteenth Amendment prohibits the exercise of personal jurisdiction over a non-resident defendant unless the defendant has meaningful "contacts, ties, or relations" with the forum state. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945). Jurisdiction may be general or specific. Where a defendant has "continuous and systematic general business contacts" with the forum state, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984), the court may exercise "general" jurisdiction over any action brought against that defendant. *Id.* at 415 n.9. Where contacts are less pervasive, the court may still exercise "specific" jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.8. This case presents only the question of specific jurisdiction.

The constitutional requirement for specific jurisdiction is that the defendant has "minimum contacts" with the forum state such that imposing a judgment would not "offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. *In Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374 (5th Cir. 2002), this court explained that the personal jurisdiction inquiry involves a three-step analysis:

> (1) whether the defendant . . . purposely directed its activities toward the forum state or purposely

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[8] But cf. *Stroman Realty, Inc. v. Antt*, 20 F. Supp. 2d 1050 (S.D. Tex. 1998) (holding that Texas court's exercise of general jurisdiction over Florida and California state officials did not violate due process because each state had a revenue office in Texas).

> availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.

Id. at 378 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

1. Minimum Contacts

To determine whether the Commissioner has "minimum contacts" with Texas, we must identify some act whereby she "purposefully avail[ed] [her]-self of the privilege of conducting activities [there], thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Commissioner's conduct must show that she "reasonably anticipate[ed] being haled into court" in Texas. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Here, the totality of the Commissioner's contacts with Texas involves a cease and desist order and correspondence with Stroman's attorneys. Although the Commissioner has "reached out"[9] to assert her authority over Stroman's Arizona-related business activities, she has not "purposefully availed" herself of the benefits of Texas law like someone actually "doing business" in Texas. *Hanson*, 357 U.S. at 253. Stroman does not allege the Commissioner has made any contacts with Texas apart from hypothetical contacts she may make with other prospective timeshare

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[9] *See Burger King*, 471 U.S. at 479-80 (holding that defendant "reached out" beyond Michigan and made a contact with Florida when he negotiated a franchise contract with Burger King, a Florida corporation).

vendors while attempting to assert "nationwide" authority. Based on such minimal known contacts, the Commissioner, a nonresident state official, could not have reasonably anticipated being haled into federal court in Texas to defend her enforcement of the Arizona statute. *World-Wide Volkswagen*, 444 U.S. at 297.

Courts generally exercise specific jurisdiction over nonresident defendants that are engaged in commercial, profit-oriented enterprise. In *Kulko. v. Superior Court*, 436 U.S. 84 (1978),[10] the Supreme Court recognized that the absence of "commercial transactions in interstate commerce" in which a defendant "sought a commercial benefit" precluded an analogy to commercial activity cases as a basis for assertion of personal jurisdiction. *Id.* at 97. The *Kulko* Court further concluded that a court's reliance on a defendant's "having caused an 'effect' in [the forum state] was misplaced" because the defendant derived no benefit from any activities relating to the forum. *id.* at 96. *See also* City of *Va. Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 488 (4th Cir. 1985) (holding that the Governor of North Carolina's participation in hearings conducted in Virginia by the Army Corps of Engineers related to a dispute with a Virginia city was not an invocation of benefits and protections of Virginia law sufficient to

[10] In Kulko, the Court held that California courts did not have personal jurisdiction in a domestic-relations case over a New York father who agreed to let his daughter live in California with her mother during the school year. Kulko, 436 U.S, at 94 ("A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was rewired under a separation agreement can hardly be said to have 'purposefully availed himself of the 'benefits and protections' of California's laws,").

subject governor to service under Virginia's long-arm statute).

Kulko is applicable here. In the first instance, the Commissioner was not engaged in commercial transactions to obtain a commercial benefit by acting in a governmental capacity to enforce Arizona law. Because no such benefit accrues to the Commissioner from her activities relating to Texas, any jurisdiction based upon her having caused an "effect" in Texas is likewise misplaced. Even if the State of Arizona itself —as a sovereign state, subject to Eleventh Amendment protections—derived a benefit from any "effects" in Texas generated by the action of the Commissioner, the benefit does not run to those officials in their individual capacity, stripped of their sovereign immunity cloak, Stroman cannot have it both ways under the *Ex Parte Young* doctrine.

Stroman argues that because this is a case involving an out-of-state defendant's conduct targeted to affect an in-state plaintiff, this circuits jurisdictional analysis is controlled by Calder's "effects test." *See Calder v. Jones*, 465 U.S. 783, 788 (1984); *see also Southmark Corp, v. Life Investors, Inc.*, 851 F.2d 763, 771-73 (5th Cir. 1988). Calder involved a California actress who brought suit in California state court against two Florida employees of a tabloid magazine and alleged she had been libeled by a story featured in their publication. Upholding the California court's jurisdiction over the Florida defendants, the Supreme Court stated that the "effects" of their tortious conduct were "expressly aimed" at California and that the plaintiff would feel the "brunt of the harm" in that state. *Calder*, 465 U.S. at 789.

Stroman argues that Texas is a similar locus for jurisdiction because the effects of the Commissioner's regulatory actions are felt there. We do not agree. Although it may be true that the Commissioner's action against Stroman is based upon conduct which occurred entirely in Texas, we cannot find, as Stroman urges, that the Commissioner has purposefully directed her conduct at Texas. Stroman more accurately recognizes that the Commissioner, by proceeding with the cease and desist order, is essentially asserting nationwide authority over any real estate transactions involving Arizona residents or property.

"Effects" jurisdiction is premised on the idea that on act done outside a state that has consequences or effects within the forum state can suffice as a basis for personal jurisdiction if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendants conduct. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 314 (5th Cir. 2007). Such jurisdiction is rare. *Id.* Moreover, as this court has noted, "[T]he key to Calder is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum." *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998) (emphasis added) (quoting *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985), cert. denied, 475 U.S. 1122 (1986)), We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident. *Moncrief, supra; see also Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 870 (5th Cir. 2001). By seeking to regulate Stroman's activities involving Arizona residents or property, the Commissioner is

not "expressly aim[ing]" her actions at Texas, *Calder*, 465 U.S. at 789. Rather, her intent is to uphold and enforce the laws of Arizona.

To illustrate, this case closely resembles *United States v. Ferrara,* 54 F.3d 825 (D.C. Cir. 1995). In *Ferrara*, the federal government sued the Chief Counsel of the Disciplinary Board of the New Mexico Supreme Court in federal court in the District of Columbia ("D.C.") for injunctive relief after she charged an assistant United States attorney ("AUSA") with violating New Mexico's rules of professional conduct based on his employment-related activities in D.C. The government, relying on Calder, argued that the federal court in D.C. had jurisdiction because the New Mexico official's actions would have a "direct effect" on prosecutions in D.C., and he official created "continuing obligations" between herself and D.C. due to ongoing licensing obligations. *id.* at 828. The appellate court rejected this argument, concluding that a preexisting relationship between New Mexico and the AUSA forbade jurisdiction because the official was simply fulfilling her duty to uphold the New Mexico Bar's ethical standards, rather than reaching out to affect ethical standards in D.C. *Id.* at 829-30.

Likewise, the Arizona licensing regulations in force when Stroman chose to deal in Arizona timeshares and with Arizona residents preclude a finding of personal jurisdiction in Texas. Like the New Mexico official in *Ferrara*, the Commissioner is upholding professional standards for real-estate brokers in Arizona. Moreover, the connection Stroman seeks to establish between the Commissioner and Texas is based entirely on the unilateral actions and decisions of Stroman, not the Commissioner. In general "[t]he

unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson*, 357 U.S. at 253. Here, it was Stroman who chose to market Arizona properties and transact business with Arizona residents. Arizona is simply attempting to uniformly apply its laws. If the court adopted the approach urged by Stroman, we would endorse an interpretation of personal jurisdiction under which the Commissioner—and, for that matter, any state official seeking to enforce her state's laws—could potentially be subjected to suit in any state where the validity of her state's laws were in question. We are unwilling to establish such a broad principle.

2. Cause of Action "Arises From" Forum-related Contacts

The second criterion for constitutionally sufficient contacts is that the underlying cause of action must "arise out of" the defendant's contacts with the forum state. The proper focus of the personal-jurisdiction analysis is on the "relationship among the defendant, the forum, and the litigation." *Calder*, 465 U.S, at 788 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). There is no question that the underlying cause of action "arises" out of the Commissioner's cease and desist order to Stroman in Texas. But keeping in mind the proper focus on the relationship among the defendant, the forum, and the litigation, we observe that the Commissioner's connection to Texas is based on Stroman's conduct, whose "effects" were targeted at Arizona and its citizens. It could be said that the Commissioner was forced to come to Texas. On balance, however, this factor weighs in favor of Stroman.

3. Reasonableness of Personal Jurisdiction

The third element of the due process inquiry, assessing the reasonableness of a court's exercise of personal jurisdiction, includes five factors: (1) the burden upon the nonresident defendant to litigate in that forum; (2) the forum state's interests in the matter; (3) the plaintiff's interest in securing relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the several states' shared interest in furthering substantive social policies. *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033 (1987); *Felch v. Transportes Lar-Mex SA De CV*, 92 F.3d 320, 324 (5th Cir. 1996).

Allowing the Southern District of Texas to assert jurisdiction over the Commissioner creates the possibility that the Commissioner will have to defend her attempt to enforce Arizona laws in courts throughout the nation. When a state defends its laws in a faraway forum, it loses the benefit of having the laws examined by local state or federal courts—courts that have special expertise interpreting its laws. *See, e.g., Leroy v. Great W. United Corp.*, 443 U.S. 173, 186 (1979) ("[F]ederal judges sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's probable enforcement of that law, than are judges sitting elsewhere."). Conversely, although a Texas court certainly has an interest in determining the legitimacy of Texas statutes, states have "little interest in adjudicating disputes over other states' statutes." *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1189 n.8 (C.D. Cal. 2000). At the same time, Arizona, as a

sovereign, has a strong interest in not having an out-of-state court evaluate the validity of its laws.[11]

Although Stroman has an interest in a convenient forum to pursue litigation, especially when it alleges harm from a constitutional violation, and Texas has an interest in providing a forum to redress the grievances of its citizens, subjecting the Commissioner to suit in the Southern District of Texas could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue. If, as is likely, these courts reside in different federal circuits, only the Supreme Court could sort out the confusion. But if the cause of action is litigated in Arizona federal court, judicial efficiency and uniformity prevail.

Important questions of federalism are present here, and thus, for this case, "the shared interest of the several states" is the most significant reasonableness consideration outlined by the Supreme Court. Federalism and state sovereignty are an essential part of the constraints that due process imposes upon personal jurisdiction. Those constraints do more than "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum"; they also "ensure that the States through their courts, do not reach out beyond the limits imposed on them by

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[11] *See, e.g., Omaha Tribe v. Barnett*, 245 F. Supp. 2d 1049, 1055 (D. Neb. 2003) ("The fundamental sovereignty of these jurisdictions could be impinged if they are not permitted to determine in their states whether these statutes are constitutional. . . ."]; *PTI Inc.*, 100 F. Supp. 2d at 1189 n.8 (analyzing reasonableness of exercising personal jurisdiction over foreign state official and noting that "[t]he conflict with state sovereignty is perhaps the most compelling factor—requiring the states to submit to California jurisdiction constitutes an extreme impingement on state sovereignty").

their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States —a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293. Accordingly, "the reasonableness of asserting jurisdiction over [a] defendant must be assessed in the context of our federal system of government." *Id.* (citation omitted). In that way, due process "act[s] as an instrument of interstate federalism." *Id.* at 294. The effect of holding that a federal district court in the Southern District of Texas had personal jurisdiction over a nonresident state official would create an avenue for challenging the validity of one state's laws in courts located in another state. This practice would greatly diminish the independence of the states.

In *World-Wide Volkswagen*, the Supreme Court cited increasing interstate commerce to justify relaxed personal jurisdiction standards. In spite of this conclusion, however, the Court emphasized that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293. We agree, and hold that it would be unreasonable to subject the Commissioner to suit in the Southern District of Texas.

This analysis would be incomplete without addressing this court's decision in *Great W. United Corp. v. Kidwell, supra*, a Fifth Circuit opinion barely mentioned in the briefs. *Kidwell* expressly found no due process violation in a Texas court's exercise of personal jurisdiction over an Idaho official who

sought to enforce an Idaho corporate takeover statute against a Texas company. This result, we conclude, has been overturned by later Supreme Court decisions. Nevertheless, *Kidwell* exposes the novelty of Stroman's maneuver in this case. *Kidwell* itself was reversed by the Supreme Court on a finding of improper venue.[12] The Court expressly declined, under its then-existing precedent,[13] to reach the due process issues surrounding personal jurisdiction. If *Kidwell*'s assumption of personal jurisdiction remained viable, this court would be bound notwithstanding the Supreme Court's reversal of the decision on other grounds. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881, 894 (5th Cir. 2001) (stating that Fifth Circuit cases overruled on other grounds by the Supreme Court remain binding authority). *Kidwell*, however, stretched the law of minimum contacts in its own day, as a vigorous dissenting opinion explained,[14] and has become irreconcilable with subsequent Supreme Court decisions whose net result is to limit "effects"-based personal jurisdiction and insist upon tangible minimum contacts between a defendant and the forum state.

In *Kidwell*, the majority concluded the "[m]inimum contacts . . . need not arise from actual physical activity in the forum state; activities in other forums

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[12] *See Leroy*, 443 U.S. at 181.

[13] *Leroy*, 443 U.S. at 181 (pretermitting "unnecessary" decision of personal jurisdiction where lack of venue was "clear"); *but see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998) (holding that federal court may not, via doctrine of "hypothetical jurisdiction," decide cause of action before resolving whether court has Article III jurisdiction).

[14] *See Kidwell*, 577 F.2d at 1287-92 (Godbold, J., dissenting in part, concurring in part).

with foreseeable effects in the forum state will suffice." 577 F.2d at 1266-67. Hence, Idaho officials, by purporting to enforce Idaho law against a hostile takeover of an Idaho company by a Texas company, "foreseeably restrained" the Texas company from carrying out its plans. *Id.* at 1267. The court distinguished *Kulko* and minimized the significance of *Hanson*'s requirement that a defendant purposefully avail itself of the privilege of doing business in a forum state. *Id.* at 1267-68. Finally, the court found a Texas court's assumption of jurisdiction reasonable in the due-process context because Idaho's officials, who cast a regulatory net for corporate transactions over the entire United States, could fairly expect to have to defend their policy in other states, and their regulation of Texas-based activities "provides the necessary contact[] with Texas." *Id.* at 1270.

Each of the components of *Kidwell* has been overtaken by later decisions. "Effects"-based jurisdiction was significantly cut back in *Calder*, and the requirement for active minimum contacts with the forum state has been emphasized, contrary to *Kidwell*, in the Supreme Court's decision in *World-Wide Volkswagen*. Finally, despite its rough justice in exposing extraterritorial regulation by state officials to scrutiny in other affected states' courts, the *Kidwell* majority's reasonableness analysis confuses fairness with the merits of the case. *See Kidwell*, 577 F.2d at 1296 (Godbold, J., dissenting). And both *Burger King* and *Asahi* later outlined the factors to determine whether a court's exercise of jurisdiction is "reasonable," providing a more exacting test than this court applied in *Kidwell*. In the absence of minimum contacts, and in the presence of significant state sovereignty concerns, the ultimate fairness of the forum should not turn on who ought to prevail. The

more nuanced approach toward fairness described in *Burger King* and *Asahi* is controlling.

CONCLUSION

For these reasons, even if the Texas long-arm statute permits an assertion of jurisdiction over the Commissioner in her official capacity, the exercise of jurisdiction related to her dealings with Stroman would violate due process.

The district court's judgment of dismissal is **AFFIRMED.**

RHESA HAWKINS BARKSDALE, *Circuit Judge*, concurring in part:

Although I concur in holding personal jurisdiction is wanting because the requisite minimum contacts are lacking, I do not concur in the opinion's extensive dicta, including parts about: whether the Texas long-arm statute applies (part A), the parties having conceded it does; state officials being sued in their individual capacity (part B.1.), Richardson having been sued only in her official capacity; and either whether the claim arises out of minimum contacts (part B.2.) or the reasonableness of a courts exercise of personal jurisdiction (part B.3.), because, as noted, those contacts are lacking.

The opinion covers the proverbial waterfront; but, all that is required to decide this appeal is found in a very small portion of it. No authority really need be cited for the longstanding acknowledgment that courts, most especially federal courts, function best, and most properly, in their assigned, limited role when they decide an issue on its most narrow, necessary basis and do not engage in unwarranted exploration of areas best left for when it is absolutely necessary to venture there. *E.g., Marshall v.*

Marshall, 547 U.S. 293, 315-16 (2006) (Stevens, J., concurring in part) (stating "obiter dicta—dicta that the Court now describes as redundant if not incoherent—generated both confusion and abdication") (citations omitted); *Jama v. Immigration and Customs Enforcement* 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."); *Ankenbrandt v. Richards*, 504 U.S. 689, 717 n.* (1992) (Stevens, J., concurring in the judgment) ("An easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case.").

APPENDIX B

[LOGO]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed DEC 22, 2005]

CIVIL ACTION NO. H-05-01203

STROMAN REALTY INC,
Plaintiff,

vs.

ELAINE RICHARDSON,
Defendant.

MEMORANDUM AND ORDER

I. INTRODUCTION

Before the Court is a Rule 12(b)(6) motion to dismiss for failure to state a cause of action and lack of personal jurisdiction filed by the defendant, Elaine Richardson, in the capacity as the Commissioner of the Department of Real Estate for the State of Arizona ("Commissioner"). Fed. R. Civ. Pro. Rule 12(b)(6). The plaintiff, Stroman Realty Incorporated ("Stroman"), filed a memorandum opposing the Commissioner's motion to dismiss. The Commissioner then filed a motion for summary judgment. Thereafter, Stroman filed a memorandum opposing the Commissioner's motion for summary judgment. After considering the motions, the pleadings, the responses, and the applicable law this Court deter-

mines that the Commissioner's motion to dismiss should be granted.

II. FACTUAL HISTORY

The Commissioner of Arizona has received numerous complaints from Arizona residents about the timeshare resale business practices of Stroman Realty. Some of the residents' complaints allege that they paid Stroman $489 for advertising fees and entered into listing agreements with Stroman. However, Stroman failed to provide prospects or examples of advertisements for their particular timeshares. Some complained that they were not able to contact either Stroman or its agents. Some Arizona brokers also complained about Stroman's business practices. In response to these complaints, the Commissioner issued to Stroman a Cease and Desist Order and Notice of Right to Request a Hearing, on January 13, 2000.

The notice stated that Stroman and its agents conducted timeshare resale activities without obtaining Arizona real estate licenses as required by state law. Stroman did not respond and did not exercise its right to seek an appeal or a judicial review of the order in Arizona state courts. The Commissioner directed that Stroman cease the resale activities and obtain the requisite licenses to comply with Arizona State licensing laws and regulations. The order became final after thirty days when no response was received from Stroman. Stroman filed its original complaint in April 8, 2005, seeking injunctive relief. On June 15, 2005, Stroman amended its complaint against the Commissioner seeking declaratory relief. In its amended complaint, Stroman alleges that Arizona's licensing requirements violates the Commerce Clause of the Constitution. The Commissioner

then filed its motion to dismiss and motion for summary judgment on all claims.

III. CONTENTION OF THE PARTIES

In its motion, the Commissioner advances three contentions: (1) Stroman's suit should be dismissed because its claim is barred by res judicata since Stroman failed to exhaust its administrative remedies or seek judicial review of the Commissioner's order; (2) a federal court in Texas does not have personal jurisdiction over the Commissioner; and, (3) venue is proper in Arizona, not Texas. Stroman argues that (1) this court does have personal jurisdiction over the Commissioner; (2) venue is proper in Texas; (3) Arizona lacked jurisdiction to enter a final administrative order; (4) claim preclusion is not applicable to Arizona's un-reviewed administrative order; (5) it is not required to exhaust administrative remedies as a prerequisite to suit under 42 U.S.C. § 1983; (6) Arizona's administrative forum, was inadequate to give Stroman relief; and (7) the cease and desist order has no effect on Stroman's claim for prospective relief

IV. STANDARD OF REVIEW

Standard of dismissal under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of an action on the grounds that a plaintiff has failed to state a cognizable claim upon which relief may be granted. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The Rule tests the legal sufficiency of the claims advanced in the complaint. *Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997). Therefore, a court will grant a 12(b)(6) motion to dismiss only if it is clear that no

relief could be granted under any set of facts that could be proved consistent with the allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss under 12(b)(6), a court must assume that all facts alleged in the plaintiffs complaint are true, and must liberally construe those allegations in the pleader's favor. *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). However, "conclusory allegations and unwarranted deductions of fact are not admitted as true." *F.D.I.C. v. Harrington*, 844 F. Supp. 300, 302 (N.D. Tex. 1994) (quoting, *Ass'n Builders, Inc. v. Ala. Power Co.*, 505 F. 2d 97, 100 (5th Cir. 1974)). Thus, a court's treatment of a motion to dismiss is limited to the four corners of the complaint.

To survive a 12(b)(6) motion to dismiss, a plaintiff must plead specific facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); sec also *Henries*, 94 F. Supp.2d at 769.

V. ANALYSIS

The Court is of the opinion that the issues set forth in the parties' motions are resolved by the doctrine of abstention and collateral estoppel. The issue of personal jurisdiction is not addressed because the Court is of the view that the abstention doctrine applies. The Court is also of the opinion that Stroman's suit is merely a collateral attack against an administrative order. Because this suit arises as a result of the Commissioner's order, this Court must give full faith and credit to that order.

Burford Abstention

The Court holds that the Burford abstention doctrine applies. The Burford abstention doctrine "defers

to a state's overriding interest in the matters sub judice and, concomitantly, to the superior competence of the state's courts to adjudicate such matters . . . where a paramount state interest is apparent." *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977). The Supreme Court spoke to this doctrine in *Orleans Public Serv. Inc.* The Court stated:

> "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the . . . orders of state administrative agencies: . . . where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"

Orleans Public Serv. Inc. v Council of New Orleans, 491 U.S. 350, 361 (1989)(citing *Colorado River Water Conservation Dist. v. United Sates*, 424 U.S. 800, 813-814 (1976).

In the case at bar, Arizona has enacted a set of laws and regulations aimed at regulating the real estate industry within its boundaries and/or realtors who do business with its citizens. Citizens could seek redress concerning issues of misrepresentation or fraud on the part of realtors through the Commissioners of the Department of Real Estate. Hence, Arizona's licensing regulations became a matter of public interest and, therefore, the Commissioner was empowered to enforce these rules and regulations in behalf of its citizens. In Stroman's case, the Commissioner issued a cease and desist order against Stroman that detailed the procedures permitted by law to either contest the order or seek judicial review. Stroman had an opportunity to

appear and defend against the charges. However, it did not. Stroman was also given adequate time to seek judicial review of the cease and desist order. Again, Stroman failed to take advantage of this opportunity. Hence, when Stroman failed to exhaust its administrative remedies, a final order was issued against Stroman and its agents. Five years after the order became final, Stroman brings this suit in federal court under the Civil Rights Act. However, Stroman has an adequate forum to address Arizona's laws. Thereafter, Court holds that federal review of the state's administrative orders will interfere and disrupt Arizona's efforts to regulate the real estate licensing requirements within its jurisdiction. This Court will not interfere.

Collateral Estoppel / Res Judicata

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *Astoria Federal Savings and Loan Association v. Solimino*, 510 U.S. 104, 107 (1991)(quoting, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)). A court "should do so equally when the issue has been decided by an administrative agency, be it state or federal. *Id.* (citing, *University of Tennessee v. Elliot*, 478 U.S. 788, 798 (1986).

As earlier noted, Stroman had notice and an opportunity to dispute the changes made against it during an administrative hearing. Furthermore, if the outcome was unfavorable, it had an opportunity to seek judicial review of the decision in the state courts of Arizona. Stroman's suit against the Commissioner's final administrative order is nothing

short of a collateral attack against a final order. The doctrine of collateral estoppel applies and the Court holds that this suit is barred irrespective of what it is called.

VI. CONCLUSION

In light of the discussion above, the Court hereby GRANTS the defendant's motion to dismiss. It is so ordered.

Signed this 22nd day of December, 2005.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX C

[LOGO]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed DEC 22, 2005]

CIVIL ACTION NO. H-05-01203

STROMAN REALTY INC,
Plaintiff,

vs.

ELAINE RICHARDSON,
Defendant.

FINAL JUDGMENT

Pursuant to the memorandum and order entered in this case, the plaintiff, Stroman Realty, Inc. shall take nothing by their suit. It is DISMISSED.

This is a Final Judgment.

SIGNED, this 22nd day of December, 2005.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed FEB 4, 2008]

No. 06-20095

STROMAN REALTY INC,
Plaintiff - Appellant,

v.

SAM WERCINSKI, Commissioner of the Department of Real Estate for the State of Arizona, 2910 North 44th Street, Suite 100, Phoenix, Arizona 85018,
Defendant - Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion January 11, 2008, 5 Cir., _____, _____ F.3d ____, ____).

Before JONES, *Chief Judge* and WIENER and BARKSDALE.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
EDITH H. JONES
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

[Filed June 15, 2005]

Civil Action No. H-05-01203

STROMAN REALTY, INC.,
Plaintiff,

v.

ELAINE RICHARDSON,
Commissioner of the Department of Real Estate
for the State of Arizona
2910 North 44th Street, Suite 100
Phoenix, Arizona 85018
Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, Stroman Realty, Inc. ("Stroman"), avers and alleges as follows:

PARTIES

The Plaintiff

1. Stroman is a corporation organized and existing under the laws of the State of Texas with its principal place of business at 14500 Hwy 105 West, Conroe, Texas 77304. Stroman is a real estate broker licensed under the laws of the State of Texas. It is engaged in the interstate and international business of brokering timeshare resales, as well as related activities. The na-

ture of its business is more fully described in paragraphs 1 through 30 infra.

The Defendant

2. Defendant Elaine Richardson is the Commissioner of the Department of Real Estate of the State of Arizona ("Arizona") and is responsible for enforcement of Title 32, Chapter 20 of the Arizona Revised Statutes. Her principal place of business is located at 2910 North 44 th Street, Suite 100, Phoenix, Arizona 85018.

JURISDICTION AND VENUE

3. Pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, this action is being brought for preliminary and permanent injunctive relief against enforcement of statutes and regulations of the State of Arizona in violation of the Commerce Clause, Article 1, § 3 clause 8 of the Constitution of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

4. Venue is proper in this district under 28 U.S.C. § 1391(b). Arizona seeks to and/or has enforced the statutes and regulations of the State of Arizona against Stroman, whose sole business office is located in the Southern Judicial District of Texas. Enforcement of these statutes and regulations will have and has had a significant adverse impact on the business of Stroman in the Southern District of Texas, on the clients and potential clients of Stroman who reside in the Southern District of Texas, and on interstate and international commerce. In addition, a substantial part of the events or omissions giving rise to the claims alleged herein occurred in the Southern District of Texas. Stroman has had and has numerous clients who reside in the Southern District of Texas and own or are or were interested in purchasing or sell-

ing timeshare facilities located in Arizona. These clients and other potential clients residing in the Southern District of Texas will be deprived of their right to use the real estate broker of their choice to resell or purchase timeshare facilities located in Arizona in the secondary market and will have their ability to participate in the national secondary market for timeshare resales significantly reduced if enforcement of the laws challenged herein is not enjoined.

RELATED CASE

5. There is a case pending before this Court in which Stroman Realty, Inc. is the plaintiff against the officials of the States of California and Florida in which the same commerce clause allegations are raised. That matter is styled, *Stroman Realty, Inc. v. Jim Antt, Jr., et al.*, Case No. H-98-0283 and is before the Honorable Lynn Hughes.

THE BUSINESS OF VACATION RESORT TIMESHARE RESALES

6. The concept of purchasing time intervals for the use of vacation resort facilities was introduced in the 1960s and continues to enjoy increasing popularity in the United States and around the world today. The concept is frequently referred to as "timeshare," "intervals" or "vacation ownership." In a timeshare transaction, the buyer typically purchases the right to use a specified unit or type of unit in a resort during a specified time interval or season. For example, a buyer can purchase the right to use a specific living unit and related amenities in a Colorado resort during the period of January 1 through January 7 for a one-time fixed price plus periodic maintenance fees. This right to use the unit can be extended in perpetuity or for a fixed period of time. The right to use the fa-

cility may be evidenced by a deed, a lease or by other methods. If the developer is successful, it will sell the remaining weeks to others.

7. A major source of a timeshare's value is the ability to exchange the right to use the facility with other timeshare owners in the United States and throughout the world. Ex. 1 at 2. The availability of exchanges is the single most important motivating factor leading to timeshare sales. Exchanges are facilitated through major companies, such as RCI and Interval International, that specialize in coordinating national and international exchanges. Almost all of the timeshare resorts in the United States are associated with either RCI or Interval International, and together they serve approximately 3 million members in coordinating national and international exchanges.

8. The timeshare business was a $5 billion industry in 1996 involving such companies as Marriott, Hyatt, Hilton, Ramada, Disney, Embassy Suites, Sheraton, Radisson and Hampton. In 2002, timeshare developers alone sold approximately $5.5 billion in timeshare intervals in the United States which compromises nearly 60% of timeshare sales worldwide in timeshares in 2002. Ex. 2 at 6. Nationally, consumer resales compromised $390 million. Ex. 3 at 1. As of January 1, 2003, there are approximately 1,590 timeshare vacation resorts located in 47 states in the United States. Ex. 2 at 3. As of 2002, there were more than 5,425 timeshare resorts worldwide. Ex. 4 at 1. The states with the largest numbers of timeshare vacation resorts are Florida, California, South Carolina, Hawaii, Nevada and North Carolina. Ex. 2 at 4. A 1997 Report by the American Resort Development Association ("ARDA Report"), the largest timeshare developer trade association in the world, contains a

table showing the location of timeshares by state. Ex. 1 at 82-83. In 1997, almost 90% of timeshare owners were first-time buyers of new units. According to a 2002 report, 60% of the timeshare intervals sold worldwide were new intervals sold by developers. Ex. 2 at 6.

9. As of 2002, Arizona has 46 timeshare resorts with 4,640 individual units. Approximately 84,162 Arizona residents own a timeshare ranking it as the fifth largest state in the country in terms of vacation ownership. Ex. 5 at 1.

10. For many reasons, such as adverse economic changes in a person's life, loss of interest, medical limitations, divorce, death, geographic moves, and maturation of children, many owners of timeshare intervals need to or want to resell their intervals. The 1997 ARDA Report found that 46% of timeshare owners are interested in selling one or more of their timeshares. Exhibit 1 at 53. To facilitate these resales a secondary market in timeshare resales has developed. Potential purchasers in the resale market for vacation timeshares are located throughout the country and the world.

11. The vast bulk of timeshare resale buyers live outside the state where the use facility is located. For example, in 1997, only 13.9% of the timeshare units in Florida were owned by Florida residents (Ex. 1 at 41, 90-91), and a limited survey of 1997 closed resale transactions showed that in every state but two, more than 72% of the buyers lived in a state different than the property location.

12. Resale prices are generally substantially less than the original purchase price. However, since the resale market is diverse and the result of individual

negotiation, it is impossible to predict the sales price of any specific interval and there are no standards by which to do so. The average cost of a timeshare unit purchased from a developer between August 2001 to July 2002 was $14,200, as compared to an average resale purchase price of $5,000. Ex. 2 at 10-11. As of 2000, approximately 15% of current owners purchased on the United States resale market. Ex. 2 at 9.

13. While Stroman and others in the secondary timeshare resale market try to promote the facilitation of resales as an extra benefit to resort owners, many of the resort developers regard resales as unwanted competition and have worked to discourage the growth of the resale market. These resort owners are motivated by the fact that a person marketing a lower priced resale is marketing exactly the same product that the resort owner is marketing at full price. Ex. 2 at 10-11. For example, if use of a resort unit is divided into 52 one-week intervals for marketing purposes, the initial purchaser from the resort owner has rights to use the exact same living space, furniture and facilities as the buyer of a different interval in that same timeshare unit on the secondary market at a much lower price. As a result, some resort owners do not permit resale of their timeshare units and others try to discourage resales and seek to impede the functioning of independent brokers such as Stroman. For example, typically resort owners will not allow "for sale" signs (the number one real estate sales tool according to the National Association of REALTORS®) on timeshare units. Typically, if a timeshare unit owner is unable to sell his unit, the resort owner may repossess it and resell it, thereby obtaining windfall profits. As of 1997, 58% of 1,204 timeshare resorts

did not provide any resale programs for their timeshare owners.

14. Because of the specialized nature of the timeshare resale market and the almost prohibitive cost of marketing a timeshare on a small scale, most traditional real estate salespersons are not equipped to handle this secondary market nor are they interested in doing so. Unique problems associated with resales that non-specialized real estate agents are generally not equipped to handle include the need for national advertising to generate sales, the agent's lack of familiarity with the many timeshare options such as deeded, fixed time, quarter shares, fractional ownership, biannual ownership, floating time, points, seasons, and right-to-use, the agent's need to coordinate with resort management to obtain accurate information and assure that the transfer will be recognized, the difficulty in obtaining title insurance and the need to contact specialized firms to do so if title insurance is available at all, and the need to coordinate a closing between residents of distant states for a timeshare often located in a third state.

15. Of the initial prices of vacation timeshares, anywhere from 30% to 65% of the price of a new sale covers the cost of marketing, promotion and advertising by the resort owner. Likewise, effective marketing to potential domestic resale purchasers requires a constant program of nationwide advertising and promotion. The existence of strong independent brokers willing and able to pursue a large-scale nationwide marketing program is essential to the existence of a viable resale market given the geographic dispersion of potential buyers and sellers, the resistance of resort owners to resales, the fact that 58% of resort owners offer no resale assistance to their interval

owners, and because nonspecialized real estate salespersons are ill-equipped to handle timeshares.

STROMAN' S BUSINESS

16. Stroman is the world's largest vacation resort timeshare resale broker. Operating from its purpose-built 16,000 square foot headquarters in Conroe, Texas, Stroman has approximately 80 licensed real estate agents to handle approximately 1,000 incoming telephone calls daily from potential buyers and sellers located throughout the country and the world.

17. Founded by its President Wayne Stroman in 1979, Stroman began to specialize in the timeshare resale market in the early 1980's. Since the Multiple Listing Service used by traditional real estate brokers is limited to a local market and has no category for timeshares, Wayne Stroman recognized the need to develop a new computerized system that could be used for marketing of timeshare resales. Thus, in order to maximize the potential of the secondary timeshare resale market, Wayne Stroman developed a sophisticated computer marketing system called the CTLS Computer System ("CTLS"). Specially tailored to the timeshare resale market, the CTLS permits Stroman to match buyer's demands with the features of a seller's timeshare interval by considering such factors as location, price, amenities and use interval. The CTLS runs on over 130 networked computers at Stroman's headquarters, and its database includes over 1 million resort property buyers, sellers and renters.

18. In order to participate in the resale market on any substantial basis, the resale broker must advertise on a national and international basis. This market imperative derives from the fact that potential buyers and sellers are located throughout the country and

the world; most prospective buyers are not fully aware of the options available; and each interval is a unique product because of factors such as its location, time slot, view, size, point systems, amenities and price. Thus, a major continuous effort is required to develop a database of potential buyers and sellers that is as broad as possible in order to facilitate sales. Stroman creates and maintains profiles of timeshare desired by prospective buyers who contact Stroman, which can be matched with timeshare owners who advertise through Stroman.

19. The critical importance of national and international advertising and promotion to this secondary market is illustrated by the distribution of buyers who purchased timeshares through Stroman. Stroman has sold timeshares located in all of the 47 states where timeshares have been developed. Stroman has sold intervals to buyers and for sellers from all of the fifty states. Over the years, only one state accounted for 10% of the buyers, three states each accounted for from 7 to 8% of the buyers, one state accounted for 5%, one accounted for 4% and Texas accounted for 8.4%.

20. Stroman advertises every day in national, international, regional and local media with a circulation ranging from 15 to 24.5 million readers. Stroman advertises daily in USA Today and frequently in newspapers in most major markets such as the New York Times, Washington Post, Chicago Sun Times, Boston Globe, Toronto Globe, Toronto Sun, Dallas Morning News, Houston Chronicle, Baltimore Sun, and a host of others. In addition, Stroman advertises in over a dozen specialty magazines and trade publications and conducts the largest direct mail operation in the resale industry. Stroman's direct mail solicitations (over 4.5

million pieces annually each year for the past ten years) target potential buyers and sellers as well as potential referral sources such as real estate agencies and developers. Stroman spends millions of dollars each year on its advertising and promotional efforts and has an active Internet site that promotes its services worldwide and currently advertises timeshares throughout the United States.

21. Stroman' s internet web site identifies resorts and the types of intervals for sale at each resort, including the attributes of the interval. A computer user is free to browse the site for various timeshares to determine if there is an interval he wishes to purchase. A potential purchaser can make an offer over the internet or call one of Stroman's licensed Texas real estate agents.

22. With the exception of internet advertising and periodic inserts into direct mail pieces, each of Stroman's advertisements is generic, advertising its resale services rather than specific timeshare intervals. This approach is dictated by the sheer number of properties in the database and the need to meet print deadlines that would make specific property listings obsolete. Some examples of Stroman's advertisements and promotional material are attached hereto as Exhibits 6, 7, 8 and 9.

23. Each of Stroman's Sales Associates is a licensed real estate salesperson or broker in the State of Texas and a member in good standing of the National Association of REALTORS.® As such, they are bound by the statutes and regulations of the State of Texas and the Code of Ethics and Standards of Practice of the National Association of REALTORS.® Both the laws of the State of Texas and the Code of Ethics and Standards require honesty by a real es-

tate agent and prohibit false or misleading representations. Stroman and its agents have a stellar reputation with the Texas Real Estate Commission.

24. Stroman's Sales Associates interview potential buyers and sellers by using prepared scripts that have been submitted to the Texas Attorney General, the Texas Real Estate Commission, and the Secretary of State for the State of Texas. When Stroman receives a call from a potential timeshare seller a licensed real estate agent obtains the vital information about the facility from the caller, including information about maintenance fees and special requirements for transfer. The information is entered into the CTLS computer system. When the seller enters into an advertising agreement with Stroman, he is charged a one-time advertising fee of $499 which registers property in the CTLS system for three years and includes internet advertising of that interval as well as the benefits of Stroman's generic advertising. In addition, the seller may agree to pay a commission of 10% or a minimum of $850, whichever is greater, when the timeshare is sold. Charges to non-U.S. clients are slightly higher.

25. The advertising fee is critically necessary to generate interstate resales of timeshares through Stroman's multimillion dollar advertising and promotional efforts. No interval could support its own nationwide advertising campaign; for example, a one week four line advertisement in the Timeshare classified section in USA Today costs $1,060 or between $260 and $316 per day, depending on the day. An individual owner would quickly spend more than the value of his timeshare at these rates. Given the high cost of advertising and promotion, and the relatively low sales prices of and commissions from timeshare resales,

effective advertising can only be supported by pooling the advertising fees of timeshare resellers. Thus, the advertising fee paid by a seller to Stroman supports the pool of funds required for the massive marketing campaign designed to attract as many potential market participants as possible. In the absence of such a pool of participants, the 46% of timeshare owners who want to sell would find their options severely limited.

26. When a potential buyer calls Stroman, a licensed real estate Sales Associate develops a profile of what the buyer is looking for in terms of time interval, location, resort project, amenities and price and tries to match the profile through the CTLS system with intervals that are being offered. Thereafter, the Sales Associate will try modifying profile elements until something close to the buyer's profile is located. The buyer is then sent a list of profiles that most closely match his request. If the buyer wants to make an offer on an interval, the seller is contacted. The Sales Associate assists in the negotiations until the parties agree to a sale or negotiations are otherwise concluded.

27. On any given day, Stroman agents speak to approximately 1,000 different people who reside in numerous states and outside the Unites States. A caller may inquire about different timeshares available in several different states during the same call. For example, a New York resident may inquire about an Arizona based timeshare owned by a Colorado resident and also a California based timeshare owned by an Arizona resident during the same phone call.

28. When a buyer and seller reach agreement, the buyer is sent a contract and asked to make an earnest money deposit along with returning the signed contract to Stroman in Texas. Once the buyer's con-

tract is received in Texas, the seller is sent a contract for execution and return to Stroman in Texas. The buyer's offer is accepted when the seller's executed contract is received in Texas. The contracts provide that they are to be governed by the law of the location of the escrow agent. Stroman generally uses the law firm of Rice, Rice & Rice, P.C., of Conroe, Texas as the escrow agent, but may use a different agent depending on the Rice firm's ability to handle the title insurance and title work relating to the closing. The Rice firm, or other closing agent then takes care of the remaining matters necessary for closing, including any special requirements of the developer, POA, exchange company, or management company.

29. In this interstate market for timeshare resales, the vast majority of sales involve two or more states. The process by which Stroman acquires property information from sellers, contacts buyers and facilitates sales is all part of a unitary course of interstate commerce protected by the Commerce Clause Art. I, § 8 of the Constitution of the United States,

30. Stroman does not have, and has never had any office in the State of Arizona or in any state other than Texas. It has no employees or general agents in Arizona and does not send employees or agents to Arizona with the exception of attending an occasional trade show or to follow up industry contacts.

31. Stroman has been conducting its interstate business essentially as described above for over two decades. Only in recent years have state governments actively sought to impose their regulatory schemes on Stroman in a manner that will force Stroman out of business. In the past, however, Stroman has withdrawn from doing business with residents of one or more states that accounted for a negligible amount of

its business when regulatory authorities insisted that Stroman be licensed in the state.

THE POSITION OF ARIZONA

32. Arizona has taken the position that Stroman and its salespersons are required to obtain Arizona real estate brokers and salesperson's licenses and comply with all of its laws and regulations if Stroman advertises Arizona timeshare interests on the internet or negotiates the sale of a timeshare interest located in Arizona, regardless of residence of the potential buyer or seller. Exhibit 10. Arizona previously issued a Cease and Desist Order against Stroman and several of its salespersons ordering "cessation of all contact with Arizona resident and nonresident owners of real estate located in Arizona for the purpose of conducting an activity requiring a real estate license in this State, whether such contact is by mail, telephone, telefax, computer modem or any other means." Ex. 11 at 4.

33. If Arizona is correct, each Stroman agent would have to be licensed in each of the fifty states because it is impossible to predetermine which states will be involved in any given transaction when Stroman receives a call from a prospective buyer.

THE REGULATORY SCHEME

34. Texas and Arizona and every other state, have comprehensive real estate licensing laws. The laws of each state contain basic educational criteria and require brokers and salespersons to be scrupulously honest in their dealings with buyers and sellers.

Arizona

35. Arizona's real estate sales licensing scheme is briefly described in the following paragraphs.

36. A real estate broker in Arizona means "a person, other than a salesperson, who, for another and for compensation "sells, exchanges, purchases, rents or leases real estate or timeshare interests", as well as anyone who negotiates the sale of or agrees to list such property interests for sale. A.R.S. § 32-2101.47.

37. Applicants for an Arizona broker's license must pay a $125 application fee, a $29 fingerprint processing fee, a $20 Recovery Fund fee and a $115 examination fee. Applicants for a salesperson's license pay a $60 application fee, $29 fingerprint processing fee, $10 Recovery Fund Fee and a $90 examination fee. The candidate for either license must also complete a prelicensure education course prescribed and approved by the Arizona Real Estate Commissioner of 90 classroom hours and pass both the real estate school's examination and the state examination. This course can only be taken in Arizona. Before activating the license, the salesperson candidate must take an additional 6 hour continuing education course in contract law and contract writing. A.R.S. §32-2124.

38. To maintain an Arizona broker's or salesperson's license, every two years the licensee must complete 24 hours of continuing education for each licensing period, including 3 credit hours each in agency law, contract law, Commissioner's Standards, real estate legal issues, Fair Housing and disclosure. The renewal fee is $125 for brokers and $60 for salespersons and is paid biannually.

39. Arizona does not have a licensing reciprocity agreement with any state. A person holding a broker's or salesperson's license in another state must request a Commissioner's Waiver to meet the pre-licensure education requirement. The request includes proof of education to be considered, a detailed resume cover-

ing the past ten years, a Certified Licensing History from any state where the broker or salesperson has been licensed in the past ten years and a letter of explanation. If the Department of Real Estate grants the waiver, the broker or salesperson still must complete a twenty-seven hour Arizona-specific course approved by the Commissioner, pass the real estate school's entire examination and pass the Arizona State examination before conducting real estate brokerage or salesperson activities. This course is offered only in Arizona and cannot be taken in any other state.

40. Arizona real estate licensees are subject to license revocation, suspension and fines for failing to comply with the license law and the commission of various enumerated offenses. These offenses include, but are not limited to, fraud, employing any unlicensed salesperson or associate broker and failing to keep an escrow or trust account for funds deposited with the licensee. A.R.S. § 32-2153. An unlicensed person cannot collect commissions for brokerage activities. A.R.S. §§ 32-2155, 32-2152. Acting as a broker or salesperson while unlicensed is a felony under Arizona law. A.R.S. § 32-2165.

41. Nonresident licensees irrevocably consent to service of process through the Real Estate Commissioner. Process served on the Commissioner constitutes service on the licensee as though the licensee were personally served in the State. A.R.S. § 32-2125.02.

42. Nonresident licensees also are required to physically maintain certain records in the State of Arizona, including records of all transactions handled through the broker, employment records for all current and former employees, hard copies of earnest money re-

ceipts, closing statements showing all receipts, disbursements and adjustments, sales contracts and any employment agreements. The records must be kept for a period of at least five years from the date of the termination of the transaction or employment. A.R.S. §§ 32-2125.02, 32-2151.01.

43. Unless all parties to the transaction agree otherwise, funds obtained by the broker must be placed in a trust or escrow account at a depository located in the State.

44. A.R.S. § 32-2163.D. states that "the offering of real estate brokerage services" as defined in A.R.S. § 32-2101.47 "for compensation or any other thing of value pertaining to real property located in this state through an internet web site constitutes activity that requires a broker's license issued by the department"

45. Although A.R.S. § 32-2163 allows in-state licensed brokers to cooperate with out-of-state brokers under certain circumstances, A.R.S. § 32.2163.E. states that "[t]his section does not allow an out-of-state broker who is not licensed in this state to list, market or advertise in this state real property located in this state for sale, lease or exchange." Further, "[a]11 negotiations in this state or with people who own property in this state shall be conducted through the licensed broker in this state." A.R.S. § 32-2163.C.2.

Texas

46. The Texas licensing requirements are more extensive than those of many other states. The real estate licensing scheme of Texas is briefly described in the following paragraphs.

47. In Texas, a real estate broker is any person who, "in exchange for a commission or other valuable

consideration or with the expectation of receiving a commission or other valuable consideration . . . for another person" sells, offers to sell, negotiates the listing or sale, lists, appraises, auctions, buys or options real estate. A real estate salesperson "means a person associated with a licensed broker for the purposes of performing acts or transactions comprehended by the definition of real estate broker as defined in the Texas Real Estate License Act. Tex. Occ. Code Ann. § 1101.02.

48. Applicants for a broker's license must complete 60 semester hours (180 hours), or equivalent classroom hours of core real estate courses to be eligible for a license. Tex. Occ. Code Ann. § 1101.356. Applicants for a salesperson's license must complete 12 semester hours in core real estate courses, including 4 hours in principles of real estate and 2 hours each in the law of agency and contract law. Tex. Occ. Code Ann. § 1101.358. Core real estate courses include, but are not limited to, principles of real estate, real estate appraisal, real estate law, real estate finance, real estate marketing, real estate mathematics, real estate brokerage, property management, real estate investments, and agency law. Tex. Occ. Code Ann. § 1101.003. Before the first, second and third annual renewal, salespersons must respectively complete 14, 16, and 18 semester hours of post-licensure education per annual renewal period. Tex. Occ. Code Ann. § 1101.454. All licensees, not subject to post-licensure educational requirements, must complete 15 classroom hours of continuing education requirements approved by the Real Estate Commission for each annual renewal. Texas Real Estate License Act § 7A. Applicants for a broker's license must pay a $300 application fee, $10 Recovery Fund Fee for each renewal and $59 for a licensing exam. Applicants for a salesperson's license must pay

a $69.50 application fee, $49 for the first three annual renewals and $102 for each renewal thereafter and $59 for a licensing exam. Resident Texas brokers must maintain an office within Texas. Tex. Occ. Code Ann. § 1101.552.

49. The Texas Real Estate Commission is authorized to suspend or revoke any license or impose fines for a host of enumerated offenses. Such offenses include, but are not limited to, violation of the Real Estate License Act, making a misrepresentation or false promise, failing to properly disclose an agency, failing to account for money or commissions, misuse of funds, failing to disclose commissions, guaranteeing profit on sale of real property, accepting secret profits, offering real estate for sale without the consent of the owner, failing to deposit money into an escrow account, or failing to produce books to the Real Estate Commission for an investigation. Administrative penalties up to $1,000 may be imposed. Tex. Occ. Code Ann. §§ 1101.651, 1101.652, 1101.702.

Other States

50. If Florida, California, and Arizona can require Stroman to comply with their respective laws pertaining to real estate sales for its interstate timeshare resale activities, Stroman would likewise be subject to the laws of the other states, all of which have similar definitions of "broker," or explicitly include soliciting timeshare sales in their definitions of broker, have educational requirements that are redundant and include topics not relevant to the timeshare resale business, and repeating fees. Thus, for example, Colorado, Virginia, and Pennsylvania all similarly define broker and salesman or specifically include those involved in timeshare sales within their definition, all have their own fee structures and educa-

tional requirements, all subject licensees to fines and other penalties for violations of rules and regulations, and all prohibit fraud or misrepresentation. The laws of many of those states would require or permit Stroman to act inconsistently with the requirements of Arizona.

51. An applicant for a Colorado real estate broker's license must complete 48 hours of classroom instruction or equivalent correspondent hours in Colorado contracts and regulations and 24 hours in real estate closings regardless of any real estate licensure in any other jurisdictions. There are additional requirements of 168 hours for brokers who have not been licensed by another state. Courses include real estate law, real estate practice, trust accounts and recordkeeping, real estate closing and real estate finance. Brokers licensed by another state do not have to take the additional 96 hours. Colo. Rev. Stat. § 2-61-103(4),(5). A portion of Colorado's triennial continuing education requirements must be met by courses taken at Colorado schools. Colo. Rev. Stat. § 12-61-110.5. In Colorado, advance fees collected for advertising purposes must be maintained in a trust fund in a Colorado bank or recognized depository and may not be withdrawn until the services agreed upon have been fully performed. Rules and Regulations at the Real Estate Commission § E-2. A Colorado real estate broker is required to use a standard form approved by the Real Estate Commission for any listing contract unless the agreement was prepared by an attorney representing a party in the transaction. Rules and Regulations of the Real Estate Commission § F-1.

52. Violation of enumerated offenses by a licensee subjects the licensee to license probation, suspension,

revocation or a fine not to exceed $2500. Violations include, among other things, misrepresentation, false promises, violation of the Colorado Consumer Protection Act, conflicts of interest, improper handling and accounting of funds, converting funds of others, improper record keeping, incompetence or unworthiness, secret fees or self dealing, or failing to adequately document continuing education completion. Practicing as a real estate broker or salesperson without a license is a misdemeanor punishable by a fine of not more than $500 or by imprisonment not to exceed six months, or, if a corporation, by fine not to exceed $5000. Colo. Rev. Stats. §§ 12-61-113, 12-61-119.

53. An applicant for a Virginia broker's license must take 12 semester-hours of real estate courses. Va. Code Ann. § 54.1-2105 (B)(2). Applicants for a salesperson's license must complete a 45 hour course in the principles of real estate. Va. Code Ann. § 54.1-2105(B)(1); see 18 Va. Admin. Code § 135-20-360(C)(5) (requiring 60 hours of study in listed areas of study). Renewal of a Virginia real estate license requires completion of 16 hours of continuing education each licensing term of which 8 hours shall include federal fair housing laws, real estate laws and regulations, ethics and standards of conduct. Va. Code Ann. § 54.1-2105(E); 18 Va. Admin. Code § 135-20-100. Escrow accounts must be maintained in a federally insured Virginia depository. 18 Va. Admin. Code § 135-20-180(A)(1). An applicant licensed in another jurisdiction may obtain a Virginia real estate license by meeting criteria that essentially require that the applicant met requirements in the other state that were substantially similar to Virginia's education and testing requirements. 18 Va. Admin. Code § 135-20-60.

54. The Virginia Real Estate Board has the power to fine any licensee and to suspend or revoke any license or registration for violation of the real estate law including, but not limited to, failing to disclose an interest, failing to disclose an agency relationship, making misrepresentations, incompetence, conflicts of interest, improper dealings, and improper maintenance of escrow funds. 18 Va. Admin. Code §§ 135-20-155, 135-20-260.

55. In Pennsylvania, a real estate broker is any person who, for another person and a fee, assists another to acquire real estate, negotiates the listing, sale, or time share for real estate, or undertakes to promote the sale or purchase of real estate. 63 Pa. Cons. Stat. § 455.201, 49 Pa. Code, § 35.201. A salesperson is any person assisting a broker in broker activities. Id. Each must be licensed to do business in Pennsylvania. 63 Pa. Cons. Stat. § 455.301. Applicants for a broker's license must pay $40 for the licensing examination, $40 for the review of qualifications, $75 for the application and $42 to $84 (depending on biennial period) to obtain an original license. 49 Pa. Code § 35.203. Applicants for a salesman's license must pay $40 for a licensing examination, $25 application fee and $32 to $64 (depending on biennial period) license fee. Id.

56. Brokers must complete 240 hours or 16 credits of instruction, half in four of the following courses: real estate law, real estate finance, real estate investment, residential property management, nonresidential property management, real estate sales, real estate brokerage and office management, residential construction, appraisal of residential property, and appraisal of income-producing property. 63 Pa. Stat. Arm. § 455.511(3), 49 Pa. Code § 35.271. An applicant

may receive two credits for each year that the applicant has been practicing in another jurisdiction with a real estate license. 49 Pa. Code § 35.271(b)(6). Real estate schools outside of Pennsylvania which have been approved "by the real estate licensing authority of the jurisdiction where the real estate education provider is located" will be accepted by the commission to fulfill the educational requirements. 49 Pa. Code § 35.271(b)(iii). Salespersons must complete 60 hours of instruction in basic real estate courses as a prerequisite to licensure. 63 Pa. Cons. Stat. § 455.521(2). 49 Pa. Code, § 35.272(a)(2). Brokers and salespersons must also complete a 14-hour Commission-approved continuing education program to be eligible for a biennial license renewal. 63 Pa. Stat. Ann. § 455.404a(b); 49 Pa. Code § 35.382(b).

57. Pennsylvania has a special category for time-share salespersons who is a person who sells or offers to sell time shares in the employ of another or as an independent contractor, under the supervision of a real estate broker. 63 Pa. Cons. Stat. § 455.201. The aggregate fees for an applicant for time-share salespersons is $97 to $129 (depending on biennial period). 49 Pa. Code § 35.203. Time-share salespersons must also complete 30 hours of instruction in contract law, sales practices, procedures and ethics, and basic resort timesharing theory and then complete 30 days of on-site training at a time share facility under the supervision of a licensed broker. 63 Pa. Stat. Ann. § 455.591.

58. Listing agreements must disclose that a Real Estate Recovery Fund is available "to reimburse a person who has obtained a final civil judgment against a Commonwealth real estate licensee owing to fraud, misrepresentation or deceit in a real estate transac-

tion . . . ." 49 Pa. Code, § 35.331(a)(1). In any listing agreement or contract of agency with a seller, a broker must disclose that the broker's commission and time period of the listing are negotiable, the purpose of the Pennsylvania Real Estate Recovery Fund and the commission telephone number at which the seller may obtain further information. 63 Pa. Cons. Stat. § 455.608. Any sales agreement or contract must contain a disclosure to prospective buyers about whether the broker represents the buyer or seller, a statement regarding the Real Estate Recovery Fund, a statement regarding zoning classifications and a statement that access to public roads may require a permit. 63 Pa. Cons. Stat. § 455.608b. A purchase contract for a timeshare must contain the following:

> You, the purchaser, may cancel this purchase at any time prior to midnight of the fifth day following the date of this transaction. If you desire to cancel, you are required to notify the seller, in writing, at (address) . . . .

63 Pa. Stat. Ann. § 455.609(b).

59. All licensees are subject to disciplinary action if found guilty of any of the following acts: making a misrepresentation or false promise, failing to hold all fees until the consummation of the transaction, commingling funds, failing to deposit a principal's funds in a trust account, failing to produce trust fund rewards to the commission, failing to maintain records for three years, acting for more than one party in a transaction, failing to furnish all signatories with a copy of a contract, self-dealings, obtaining secret profits, being convicted of felony, violating any Commission Rule, conducting deceptive contests, showing incompetence, unworthiness, bad faith, or dishonesty, etc. 63 Pa Stat. Ann. § 455.604(a). Practicing real

estate without an active license is unlawful and punishable as a criminal summary offense by a $500 fine and/or 3 months imprisonment; subsequent offenses are considered third degree felonies punishable by a $2,000 to $5,000 fine and between one to two years incarceration. 63 Pa. Cons. Stat. §§ 455.301, 455.303. Unlicensed practitioners of real estate may not prosecute an action for the recovery of real estate commissions or fees. 63 Pa. Cons. Stat. § 455.302. Licensed and unlicensed practitioners of real estate may also be assessed a civil penalty by the commission not to exceed $1,000 for a violation of the Pennsylvania Real Estate Licensing and Administration Act. 63 Pa. Cons. Stat. § 455.305.

60. If Stroman is subject to the licensing laws of Florida, California, Arizona then it is also subject to the licensing laws of the other 47 states. If so, each of its sales personnel will have to be licensed in all fifty states, because no one can anticipate what three states (location of buyer, seller and property) will be involved in any negotiation or transaction. In many cases, more than three states will be involved because Stroman's Sales Associates often talk to potential buyers in many states about a specific property before a sale is consummated. Stroman could not possibly afford the cost of the hundreds of hours lost for each agent to become licensed and remain in compliance with fifty different states as well as the hundreds of thousands of dollars this licensing would cost, not only initially but on an ongoing basis. If it were required to be licensed in California, Florida, and Arizona Stroman would have no choice but leave the business, as would other timeshare resale brokers like Stroman. As a result, the volume of sales in interstate commerce would significantly decline, timeshare owners would be significantly deprived of access to the secon-

dary market, and Stroman's multimillion dollar investment over the last 25 years in the business will be lost.

61. Enforcement of Arizona's real estate licensing laws and regulations against Stroman, in practical effect, discriminates against interstate commerce, unduly burdens interstate commerce, will force Stroman out of the timeshare resale business and deprive actual and potential buyers and sellers of timeshares on the secondary resale market of the ability to effectively participate therein on their own or through their selected and/or local broker.

62. Arizona's real estate licensing laws discriminate against interstate commerce, in effect, by forcing Stroman and other participants in the secondary market to undertake heavy burdens that local participants who compete with Stroman do not have to bear. For example, among other things, under the Arizona laws, Stroman would not only have the extra expense of having eighty or more salespersons obtain and maintain Arizona licenses, even though Stroman and its sales people already hold licenses in Texas. Stroman also will have the additional expense of duplicating its transaction and employment records and physically maintaining them in Arizona. These expenses would force Stroman to withdraw from doing business with Arizona residents or timeshares located in Arizona. Local licensees do not have the extra cost of obtaining and maintaining licenses in more than one jurisdiction, or of maintaining multiple transaction and employment records.

63. The effect of applying Arizona's local licensing legislation to the interstate business of timeshare resales is to create such barriers to the conduct of interstate business that Stroman is deprived of access to

local demand for its services in violation of the Commerce Clause. This discriminatorily favors the local business interests of developers in Arizona who want to limit and/or suppress the national and international secondary resale market and the local brokers who generally limit their business to timeshares within their single state.

64. Since many state laws are inconsistent, subjecting Stroman's interstate business in the secondary timeshare resale market to local legislation such as that of Arizona will subject Stroman to a hodgepodge of different and/or inconsistent regulations that will make it impossible or impossibly expensive to participate in this interstate commerce. For example, California, Florida and Arizona all require that funds be escrowed in financial institutions in their own state. Were Stroman to broker the sale of an Arizona property, with a Florida owner (or jointly owned by Florida and Colorado residents) and a California buyer, and collect an advertising or advance fee, no matter what Stroman did with the money it would be at jeopardy of serious fines, if not imprisonment. Similarly, the laws of the various states contain other inconsistent requirements, including, but not limited to, disclosure, advance fee, right to cancel, and record-keeping requirements.

65. Application of Arizona's real estate licensing law and the regulations relating thereto to Stroman's interstate business in the secondary market for timeshare resales violates Article I, Section 3, clause 8 of the Constitution of the United States because, among other reasons:

a) the application in effect discriminates against interstate commerce in favor of local business and as such is per se illegal because there are

alternative ways for Arizona to accommodate any legitimate state interest it may have relating to this commerce;

b) the application creates an undue burden on interstate commerce by placing an intolerable financial burden on Stroman due to, among other things, the education requirements, reporting requirements, escrow deposit requirements, requirements regarding the maintenance of records and by subjecting Stroman to requirements that are inconsistent with the requirements of other states which are involved in the continuous flow of the same interstate commerce;

c) the application creates an undue burden on interstate commerce by subjecting Stroman to requirements that bear little or no relationship to any legitimate regulatory interest that Arizona may have;

d) the application creates a burden on interstate commerce that is excessive in relation to any local benefit that might be obtained thereby;

e) the application projects the effect of Arizona's laws into other states by forcing Stroman to comply with Arizona's laws in timeshare resale transactions involving residents of different states;

f) the application requires Stroman to obtain a license to engage in interstate commerce;

g) this is an area of commerce that requires uniform regulation.

66. As a result of Arizona's enforcement and efforts to enforce Title 32, Chapter 20 of the Arizona Revised Statutes and the regulations promulgated there-

under, Stroman has suffered and will continue to suffer irreparable injury in the form of lost sales and profits, increased expenses, exposure to fines and/or imprisonment, exposure of its contracts to being declared invalid and the potential of being forced out of business. Stroman will not be able to obtain compensation for these injuries. Stroman will continue to suffer these injuries unless enforcement of the foregoing laws and related regulations is enjoined.

WHEREFORE, Stroman requests the entry of an order:

a) preliminarily and permanently enjoining Elaine Richardson as Commissioner of the Department of Real Estate of the State of Arizona from enforcing Title 32, Chapter 20 of the Arizona Revised Statutes and the regulations thereunder against plaintiff in the conduct of its business in the timeshare resale market or such portions of said statutes and regulations that the Court finds should be enjoined;

b) granting attorney's fees, costs and such other and further relief as the Court deems just and proper.

Respectfully submitted,
Attorney-In-Charge

/s/ Leslie A. Powell
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APPENDIX F

STATE OF ARIZONA
DEPARTMENT OF REAL ESTATE

[LOGO]

JANET NAPOLITANO
GOVERNOR

ELAINE RICHARDSON
COMMISSIONER

2010 NORTH 44TH STREET, SUITE 100
PHOENIX, ARIZONA 85018
TELEPHONE (602) 468-1414
FACSIMILE (602) 468-3514

400 WEST CONGRESS, SUITE 523 TUCSON,
ARIZONA 85701
TELEPHONE (520) 628-6940
FACSIMILE (520) 628-6941

March 10, 2005

Rice, Rice & Rice, PC
Robert L. Rice
675 River Road
Montgomery TX 77356

Re: Case #CO5-000046

Dear Mr. Rice:

This is in response to your letter of March 8, 2005 to Mr. Ken Lamb concerning the above case. In your letter you ask if A.R.S. § 32-2101(47) "is the sole statutory basis for the demands contained in the writing" (Lambs February 14 letter). The response is no, A.R.S. § 32-2163 addresses activities by brokers/ sales agents outside Arizona doing business within Arizona. The first portion of this statute sets out the

methods by which this may be legally accomplished, by virtue of a cooperative agreement with an Arizona broker. The specific sections of interest in this case are D and E, which read

> D. The offering of real estate brokerage services specified by section 32-2101, paragraph 47 for compensation or any other thing of value pertaining to real property located in this state through an internet web site constitutes activity that requires a broker's license issued by the department.
>
> E. This section does not allow an out-of-state broker who is not licensed in this state to list, market or advertise in this state real property located in this state for sale, lease or exchange.

Additionally, Mr. Wayne A. Stroman, Linda McCarthy, Polly DeVoss, and Carl Rash, all of Stroman Realty, Inc., along with Charlie Horton, were the subject of a Cease and Desist Order issued by this Department January 13, 2000, in which they and Stroman Realty, Inc., were ordered to "immediately cease and desist from engaging in real estate activity, as defined by A.R.S. § 32-2101 et. seq., as employees, agents, officers, principals, or in any capacity whatsoever, directly or indirectly, as described herein, within the State of Arizona without first complying with applicable laws and rules." The order goes on to direct a "cessation of all contact with Arizona resident and non-resident owners of real estate located in Arizona for the purpose of conducting an activity requiring a real estate license in this state, whether such contact is by mail, telephone, telefax, computer modem or any other means." A copy

of this order was mailed to Robert L. Rice IV of your office at the time of its signing.

Initially Mr. Lamb advised your Client that this case was opened as a possible advertising issue, It is more than that; **rii** Stroman is listing Arizona timeshares for sale on its website, is soliciting Arizona timeshare owners, in Arizona, by telephone to attempt to gain properties for sale, and has contacted an Arizona based broker to request payment of a commission for a sale of an Arizona timeshare. Each of these is in violation of A.R.S, § 32-2163 and the Cease and Desist order of January 2000.

We request a full response to these allegations no later than March 31, 2005.

Sincerely,

/s/ Tom Adams
TOM ADAMS
Director, Investigation Division

cc: file

APPENDIX G

BEFORE THE ARIZONA DEPARTMENT
OF REAL ESTATE

CEASE & DESIST ORDER AND NOTICE OF
RIGHT TO REQUEST HEARING
NO. 99A-11O-REL

In re: WAYNE A. STROMAN, STROMAN REALTY, INC., doing business as ERA STROMAN, CARL RASH, LINDA MCCARTHY, CHARLIE HORTON, POLLY DEVOSS,
Respondents.

DIRECTED TO:

Wayne A. Stroman
Stroman Realty, Inc.
d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304

Stroman Realty, Inc.
d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304

Linda McCarthy
Stroman Realty, Inc.
d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304

Polly DeVoss
Stroman Realty, Inc.
d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304

Carl Rash
Stroman Realty, Inc.
d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304

Charlie Horton
550 S. Pine Lake Rd.
Montgomery, Texas 77356

After investigation and review by the Arizona Department of Real Estate ("Department"), upon information and belief it is alleged that:

1. Respondents are licensed real estate salespersons and brokers in the state of Texas.

2. Respondents are not licensed as real estate brokers or salespersons in the state of Arizona.

3. The above-named Respondents, by and through their officers and agents, have used the mail, telephone and Internet as means of contacting Arizona resident and non-resident owners of real estate located in Arizona by conducting a telemarketing land sales operation.

4. On or about April 13, 1999, Johnny Griffith ("Griffith"), designated broker of Sunterra Resorts, filed a complaint with the Department against Stroman Realty, Inc., d.b.a. ERA Stroman ("ERA Stroman"). Griffith received an advertisement from ERA Stroman that reads "Dear All Season Resorts Inc Would you be willing to sell your Timeshare Property for cash? Call Today: TOLL FREE 1-800-829-1544 Enclosure" (sic). Griffith's complaint alleged that ERA Stroman is soliciting in the state of Arizona without a license.

5. On or about May 28, 1999, Linda McCarthy, through ERA Stroman, wrote two purchase contracts on behalf of M.D. and Jo Neill and Mark and Rebecca Tait, for the purchase of two timeshare intervals located in Sedona, Arizona, owned by Donald and Phyllis Miller. Both purchase contracts provide that "seller agrees to pay referring broker 10% of the sales price or a minimum of $750 commission whichever is greater at the time of funding." Donald Miller told the Department that he learned about ERA Stroman

through advertising mailers he received from ERA Stroman to solicit the resale of his timeshare, M.D. Neill and Mark Tait told the Department that they learned about ERA Stroman by searching the Internet.

6. On or about June 16, 1999, Joe E. Price ("Price"), a resident of Arizona, filed a complaint with the Department against ERA Stroman. Price stated that he received "several" solicitations from ERA Stroman in June and July, 1998. Price called the telephone number on the advertisements and was informed that for an advertising fee of $489, ERA Stroman would advertise his timeshare with several different sources.

7. On or about July 6, 1998, Price entered into a listing agreement with ERA Stroman, and paid an advertisement fee of $489 for the sale of a timeshare interval he owns in Las Vegas, Nevada. The listing agreement was signed by Carl W. Rash of ERA Stroman. Price further stated that, as of June 13, 1999, he has not received any example of the advertisements or prospects for the resale of the timeshare interval.

8. On or about June 16, 1999, Roswitha Ottemann ("Ottemann"), a resident in Arizona, filed a complaint with the Department against ERA Stroman. Ottemann stated in the complaint that since October 1998, she has received solicitations from ERA Stroman to sell her timeshare at the Olympic Village Inn, in Olympic Valley, California. In or about March 1999, Ottemann called the telephone number in the advertisement and reached Charlie Horton of ERA Stroman. Ottemann told Horton that she had two other timeshares in Vail, Colorado. According to Ottemann, Horton informed her that

there would be a one-time advertisement fee of $489 for listing all of her timeshares.

9. On or about March 1, 1999, Ottemann entered into a listing agreement with ERA Stroman and paid an advertisement fee of $489 for the sale of timeshare intervals she owns in Olympic Village Inn in Olympic Valley, California, and Apollo Park in Vail, Colorado. Ottemann stated that, as of June 7, 1999, she has heard nothing since she listed her timeshare intervals with ERA Stroman.

10. On or about June 24, 1999, Rosalie E. Paceley ("Paceley"), a resident of Arizona, filed a complaint with the Department against ERA Stroman. Paceley stated she has received "many" mailings from ERA Stroman soliciting the resale of her timeshare. Paceley received a letter from Polly DeVoss of ERA Stroman, dated May 7, 1999, which describes the services ERA Stroman provides. Paceley received a second letter from DeVoss, dated May 21, 1999, which acknowledged Paceley's inquiry about her property at Scottsdale Camelback Resort and explained the services ERA Stroman provides.

11. None of the agreements conform to the requirements of A.R.S. § 32-2151.02(A).

12. Respondents' conduct constitutes activity for which an Arizona real estate license is required, within the meaning of A.R.S. § 32-2101(46).

13. Neither Respondents nor any officer or agent thereof hold Arizona real estate broker's or salesperson's licenses.

14. Respondents have collected from Arizona residents and non-resident owners of real estate located in Arizona non-refundable $489 "advertising fees" or

"registration fees" to market real estate timeshare intervals or uses.

15. Respondents have engaged in activities in this State requiring a real estate license, in violation of A.R.S. §§ 32-2122 (B) and (C), and 32-2155.

16. Respondents' actions are not exempt from the license requirements pursuant to A.R.S. § 32-2121.

17. Respondents have continued to market services as a real estate broker after being advised, on April 23, 1999, that licensure in the state of Arizona is required, pursuant to A.R.S. § 32-2155.

CEASE AND DESIST

NOW, THEREFORE, the Real Estate Commissioner ("Commissioner") finds the public health, safety or welfare imperatively requires immediate action. Accordingly, pursuant to A.R.S. § 32-2154.

IT IS ORDERED that Respondents WAYNE A. STROMAN, STROMAN REALTY, INC., doing business as ERA STROMAN, POLLY DEVOSS, CARL RASH, LINDA MCCARTHY, and CHARLIE HORTON immediately cease and desist from engaging in real estate activity, as defined by A.R.S. § 32-2101 et. seq., as employees, agents, officers, principals, or in any capacity whatsoever, directly or indirectly, as described herein, within the State of Arizona without first complying with applicable laws and rules.

IT IS FURTHER ORDERED that Respondents take affirmative action pursuant to the direction of the Commissioner or his representatives to correct the conditions resulting from the violations of law stated above, including but not limited to:

a. Immediate cessation of all contact with Arizona resident and non-resident owners of real estate located in Arizona for the purpose of conducting an activity requiring a real estate license in this State, whether such contact is by mail, telephone, telefax, computer modem or any other means.

b. The immediate return of all monies solicited from Arizona resident and non-resident owners of real estate by Respondents to such residents, which were solicited and received in the course of the unlicensed activities pursued by Respondents.

This Cease and Desist Order is an appealable agency action pursuant to A.R.S. § 41-1092. Therefore, if Respondents do not agree with this Cease and Desist Order and/or do not intend to comply with it, Respondents may request an administrative hearing to contest this action by filing a Notice of Appeal within thirty (30) days of Respondents' receipt of this notice. Failure to timely file a Notice of Appeal will constitute a waiver of Respondents' right to any hearing on this matter and to any other appeal right to which Respondents are otherwise entitled. The Notice of Appeal must identify the appealing party, the party's address, the action being appealed and must also contain a concise statement of the reasons(s) for the appeal.

Pursuant to A.R.S. § 41-1092.05, the hearing shall be held within sixty (60) days after the Notice of Appeal is filed. Although Respondents may request the Office of Administrative Hearings to delay or advance the hearing date, such request may be approved or denied in its sole discretion. The Department of Real Estate will serve a Notice of Hearing at least thirty (30) days before the hearing, which will inform Respondents of the date, time and

location of the hearing as well as further articulate the allegations being contested.

If Respondents file a Notice of Appeal, Respondents may also request an Informal Settlement Conference at the time of filing the Notice of Appeal, or separately by filing a written request no later than twenty (20) days before the scheduled hearing. This conference shall be held within fifteen (15) days after receipt of the request. Although a Department representative with authority to act on behalf of the Department will be present at the conference, the Department is under no obligation to accept settlement terms Respondents may offer. The scheduled hearing will not be delayed by the Informal Settlement Conference.

The Notice of Appeal and request for an informal Settlement Conference should be addressed to:

Admin. Actions Div., AZ Dept. of Real Estate
2010 N. 44th Street, Suite 100
Phoenix, Arizona 85018

DATED this 13th day of January, 2000.

/s/ Cindy Wilkinson
CINDY WILKINSON, Admin. Actions Director
Arizona Department of Real Estate

COPY of the foregoing Order sent by Certified Mail, Return Receipt Requested, this 13th day of January, 2000, to:

Wayne A. Stroman
Stroman Realty, Inc., d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304
Respondent

Stroman Realty, Inc., d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304
Respondent

Charlie Horton
550 S. Pine Lake Rd.
Montgomery, Texas 77356

Carl Rash
Stroman Realty, Inc., d.b.a. ERA Stroman
14500 Highway 105 West
Conroe, Texas 77304
Respondent

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(2)

No. 07-1387

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JUL 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

STROMAN REALTY, INC.,

Petitioner,

v.

SAM WERCINSKI, Commissioner of the Department of Real Estate for the State of Arizona,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether differences in analyses concerning the propriety of exercising specific personal jurisdiction over nonresident public officials in § 1983 cases that are based on factual distinctions rather than on disparate legal positions concerning the proper standard to apply to similar facts in such cases create any conflict among the circuit courts that this Court needs to address.

2. Whether this Court should grant the petition for writ of certiorari to address which due-process analysis applies in federal-question cases once the forum State's long-arm criteria are met when that issue was neither raised nor addressed below.

3. Whether this Court should grant the petition for writ of certiorari to address whether the Due Process Clause applies in the first instance against public officials in their official capacities when that issue was neither raised nor addressed below.

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STATEMENT OF THE CASE

Arizona law requires the Commissioner of the Arizona Department of Real Estate to investigate written complaints concerning "the actions of any natural person or entity engaged in the business or acting in the capacity of a [real estate] broker, salesperson, or developer." Arizona Revised Statutes § 32-2108(A). The Commissioner received numerous complaints from Arizona residents concerning Stroman Realty, Inc. (Stroman), a Texas-based company. Appendix to Stroman's Petition for Writ of Certiorari (Pet. App.) 25a, 34a. Following an investigation, Commissioner Elaine Richardson[1] issued a Cease and Desist Order and Notice of Right to Request a Hearing (the Order) on January 13, 2000, finding that Stroman and its agents, none of whom had an Arizona real estate license, were engaging in timeshare resale activities for which an Arizona real estate license was required. Pet. App. 67a-73a. The Commissioner found that "the public health, safety, or welfare imperatively require[d] immediate action" and ordered Stroman and its agents to stop such activities until they complied with Arizona's real estate licensing laws and regulations. *Id.* 71a-72a.

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[1] Sam Wercinski replaced Elaine Richardson as Commissioner on January 11, 2007, and was automatically substituted as the Defendant-Appellee in this case. *Id.* 3a n.1.

The Order informed Stroman and its agents that (1) they had a right to invoke the statutory administrative appeal and judicial review process and (2) that the Order would be given preclusive effect if they did not timely exercise those rights. *Id.* 72a-73a. Stroman did not respond, and the Order became a final, non-appealable administrative decision pursuant to Arizona law. *Id.* 5a.

Stroman continued to broker transactions that involved Arizona residents and timeshares despite the Order, and the Commissioner contacted it by mail in early 2005, asking it to respond to allegations that it was violating Arizona law and the Order. *Id.* 64a-66a. In response, Stroman filed a 42 U.S.C. § 1983 action against the Commissioner in her official capacity in the Southern District of Texas. *Id.* 34a-63a. The complaint sought (1) a declaration that the Commissioner's attempted enforcement of Arizona's real estate statutes and regulations against Stroman violated the Commerce Clause, *id.* 5a, 59a-61a, and (2) an injunction prohibiting the Commissioner from enforcing Arizona's statutes and regulations against Stroman, *id.* 62a.

The Commissioner filed a motion to dismiss arguing that (1) res judicata principles barred Stroman's complaint; (2) the federal district court in Texas lacked personal jurisdiction over the Commissioner; and (3) venue was proper in Arizona, not Texas. *Id.* 26a. The Commissioner also filed a summary judgment motion arguing that the statute of limitations barred Stroman's action. *Id.* 5a. The district court granted the motion to dismiss on res

judicata grounds and also concluded that it should abstain from hearing the case based on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Pet. App. 27a-31a.

Stroman appealed to the United States Court of Appeals for the Fifth Circuit. *Id.* 1a. The Fifth Circuit affirmed on the ground that the Southern District of Texas lacked personal jurisdiction over the Commissioner. *Id.* 1a-23a. It subsequently denied Stroman's Petition for Rehearing en Banc. *Id.* 32a-33a.

REASONS TO DENY THE PETITION

I. The Differing Analyses Reflected in the Cases that Stroman Cites Are Based on Factual Differences Among the Cases, Not on Any Conflict Among the Circuit Courts Concerning the Proper Legal Standard to Apply to Similar Facts in Such Cases.

A. The Cases that Stroman Cites Do Not Support Its Contention that Only the *Calder* "Effects" Test Should Govern the First Step of the Jurisdictional Analysis in § 1983 Actions Against Public Officials Sued in Their Official Capacities or Its Contention that There Is a Conflict Among the Circuits Concerning This Issue.

Stroman contends that the Fifth Circuit's ruling that it lacks personal jurisdiction over the Commissioner conflicts with the Ninth Circuit's ruling in

Ziegler v. Indian River County, 64 F.3d 470 (9th Cir. 1995). Pet. at 11-12. Stroman is wrong because *Ziegler* and the other cases on which Stroman relies differ factually from the present case. It is those differences, not conflicting legal rulings concerning the proper standard to apply to similar facts in § 1983 actions against public officials in their official capacities, that explain the differences in their analyses.

The Due Process Clause requires that individuals receive fair warning that certain actions may subject them to suit in a foreign forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). This requirement is satisfied if a defendant has "certain minimum contacts" with the forum so that requiring him to defend a suit in the forum "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Where a cause of action is based upon or related to a defendant's activities in the forum State, a court may exercise specific jurisdiction over the defendant if the "'relationship among the defendant, the forum, and the litigation'" is such that requiring the defendant to defend a suit in the forum is reasonable under due-process standards. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

This Court has noted that "[l]ike any standard that requires a determination of 'reasonableness,'" the minimum-contacts test does not lend itself to "mechanical application; rather, the facts of each case

must be weighed to determine whether the requisite 'affiliating circumstances' are present." *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92 (1978) (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 (1958)). This Court has also instructed that courts must consider "the 'quality and nature' of [a] defendant's activity" in determining whether the exercise of personal jurisdiction over him comports with due-process requirements. *Id.* at 92 (quoting *Int'l Shoe*, 326 U.S. at 319).

In the present case, the Fifth Circuit applied the correct test to determine whether the exercise of specific personal jurisdiction over the Commissioner was proper: (1) whether she "purposefully directed [her] activities toward the forum state [Texas] or purposely availed [herself] of the privileges of conducting activities there"; (2) whether Stroman's cause of action arose out of or resulted from the Commissioner's forum-related contacts; and (3) whether the exercise of personal jurisdiction over the Commissioner would be fair and reasonable. Pet. App. 10a-11a.

In addressing the first step of the specific personal-jurisdiction inquiry, the Fifth Circuit stated that under the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), "'the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum.'" Pet. App. 14a (quoting *Allred v. Moore & Peterson*, 117

F.3d 278, 286 (5th Cir. 1997)).[2] It further explained that under the test, "an act done outside a state that has consequences or effects within the forum state can suffice as a basis for personal jurisdiction if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct." *Id.*

Calder's language supports the Fifth Circuit's interpretation. In *Calder*, this Court noted that the California appellate court had concluded that California courts could properly exercise personal jurisdiction over the Florida defendants because the defendants "intended to, and did, cause tortious injury" to a California resident with the allegedly libelous article about her that they had written and edited in Florida. *Calder*, 465 U.S. at 787. This Court approved of and adopted this approach. *Id.* n.6. In doing so, it observed that the defendants had "not [been] charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* at 789. The Court also observed that the defendants

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[2] As Stroman acknowledges, *Calder's* "effects" test is used in tort cases to determine whether a defendant's actions fall within this step, whereas in commercial cases, courts examine whether the defendant has engaged in "some act by which [he] purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253. *See* Pet. at 16.

knew that the article "would have a potentially devastating impact" on the plaintiff. *Id.*

The Fifth Circuit determined that the Commissioner did not have the requisite intent to warrant Texas's exercise of personal jurisdiction over her based on the "effects" test. Pet. App. 14a-15a. It concluded that "[b]y seeking to regulate Stroman's activities involving Arizona residents or property, the Commissioner [was] not 'expressly aim[ing]' her actions at Texas," but was instead intending "to uphold and enforce" Arizona law. Pet. App. 14a-15a (quoting *Calder*, 465 U.S. at 789). It stated that in doing so, the Commissioner was "essentially asserting nationwide authority over any real estate transactions involving Arizona residents or property" rather than "purposefully directing" any conduct at Texas. Pet. App. 14a.

Although Stroman states that any assertion that a public official is authorized to exercise his authority goes to the merits of the case, not to the jurisdictional analysis, Pet. at 23 n.10, the fact that a public official's actions involve enforcing presumably valid state laws is relevant to determining whether the official acted with the type of intent that the "effects" test requires. Without more, such actions simply do not establish that an official intended to inflict serious harm or injury or that serious harm or injury was likely to follow from the official's actions. *See Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 663 (7th Cir. 2007) (noting in affirming the district court's decision to abstain from ruling on Stroman's case while a state

administrative proceeding concerning Stroman was pending that "[a]t best, Stroman has argued that the statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies").

Ziegler and the cases that Stroman cites for the proposition that *Calder* should govern all § 1983 actions against public officials, Pet. at 14-18, are factually distinguishable from the present case because the officials in those cases were not simply enforcing state laws and the plaintiffs in them were not simply seeking to enjoin the enforcement of those laws. The officials instead engaged in conduct that was intended to or was at least highly likely to cause harm or injury in another forum, and the plaintiffs were seeking to recover damages for the harm or injury that the officials had caused. *See Ziegler*, 64 F.3d at 475 (nonresident officials had the forum resident arrested for grand theft "despite their apparent knowledge that no crime had been committed"); *Lee v. City of Los Angeles*, 250 F.3d 668, 677-78 (9th Cir. 2001) (nonresident police officers traveled to the forum State and took a seriously mentally ill man back to their State without comparing his fingerprints or personal characteristics to those of the man wanted in their State; the man spent two years in prison where he was assaulted by other inmates until the mistake was revealed by the arrest of the real fugitive); *Taylor v. Phelan*, 912 F.2d 429, 430-31 (10th Cir. 1990) (nonresident police officers assured forum residents that they were investigating the sexual

assault of their daughter and that the residents were not in any danger from the assailant; after a nonresident officer who did not have any present ability to arrest the assailant informed him by telephone that a warrant had issued for his arrest, the assailant broke into the forum residents' home, seriously injured three family members, and killed a fourth); *Overby v. Johnson*, 418 F. Supp. 471, 471 (E.D. Mich. 1976) (former medical directors of the Michigan prison in which the plaintiff was incarcerated who no longer lived in Michigan had allegedly deprived the plaintiff of adequate medical care by failing to provide him with the low-cholesterol diet that his diseased arteries required); *Maney v. Ratcliff*, 399 F. Supp. 760, 764-66, 773 (E.D. Wis. 1975) (Louisiana officials placed an entry in the National Crime Information Center database stating that the forum resident was wanted in Louisiana but never provided extradition papers following the forum resident's three arrests based on that entry or removed the entry from the database).[3]

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[3] Stroman also cites *Stroman Realty, Inc. v. Antt*, 20 F. Supp. 2d 1050 (S.D. Tex. 1998), Pet. at 14 n.3, 25, in which Stroman had sued California and Florida officials based on the same claims that it made against the Commissioner in this case. The Fifth Circuit recently reversed that decision in light of its decision in this case and found that the federal district court in Texas lacked personal jurisdiction over the California and Florida officials. No. 05-20803, 2008 WL 2043193 (5th Cir. May 14, 2008).

Stroman also cites *Dial-Up Services, Inc. v. Oregon*, No. 07-00423-PHX-EHC, 2007 WL 4200756 (D. Ariz. Nov. 27, 2007). Pet. 14 n.4. Although *Dial-Up Services* cited *Ziegler* for the

(Continued on following page)

Thus, the facts of these cases could establish that the forum State's exercise of personal jurisdiction over nonresident public officials comported with due-process requirements under the *Calder* "effects" test, whereas the facts of the present case could not.

Stroman also argues that the Fifth Circuit erred in declining to follow *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). Pet. at 12-15. In *Kidwell*, the Fifth Circuit held that a federal district court in Texas could properly exercise personal jurisdiction over the Idaho officials who had enforced Idaho's takeover statutes against a Texas company and had delayed the effectiveness of its tender offer for an Idaho company's stock in the process. 577 F.2d at 1270. The court based its determination in part on the effects that the officials' actions had had on the company. It noted that by enforcing Idaho law, the officials had caused the company to make efforts to comply with that law and had prevented it from proceeding with its plans. *Id.* at 1267. It believed that these types of effects "on important business plans" were "more than sufficient to satisfy the minimum contacts requirement." *Id.* It likened the officials' actions to

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proposition that § 1983 claims for deprivation of constitutional rights were more like tort claims than like contract claims, 2007 WL 4200756 at *4 n.2, it was not a § 1983 case. The plaintiff instead sued under the federal All Writs, Anti-Injunction, and Declaratory Judgment Acts. *See* 2007 WL 4200756 at **2, 4.

the tort of intentional interference with a commercial relationship, *id.* at 1268, and commented that "the impact of [the officials'] regulation was felt in Texas, as they intended it to be," *id.* at 1269.

The Fifth Circuit declined to follow this aspect of *Kidwell* because it believed that *Calder* had "significantly cut back" "effects"-based jurisdiction. Pet. App. 21a. The Fifth Circuit was correct because as previously discussed, public officials enforcing presumably valid state laws do not, without more, manifest the type of intent to inflict serious injury or harm in another forum that is an essential component of the "effects" test under *Calder*.

Another case that Stroman cites, *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), illustrates that the facts of all § 1983 official-capacity actions[4] do not fit the tort-based model to which the *Calder* "effects" test would apply, but that courts may nevertheless find that a forum State's exercise of personal jurisdiction over the defendants in such actions comports with due-process principles based on other factors. In *Grand River*, several tobacco companies filed a § 1983 action in federal district court in New York against thirty-one current and former state attorneys general in their

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[4] Although the decision does not state that the plaintiffs sued under § 1983, that information appears in the underlying unreported decision, which the published decision cites. *See* 425 F.3d at 164.

official capacities challenging state statutes enacted pursuant to a master settlement agreement that had settled litigation between numerous tobacco companies and forty-six States. *Id.* at 162. In the litigation, the States were attempting to recover the costs of treating smoking-related illnesses. *Id.* The agreement had resulted from negotiations that representatives of forty-six States and of the tobacco companies had conducted in New York City over a five-month period. *Id.*

In determining that the exercise of personal jurisdiction over the defendants in New York was proper, the Second Circuit found that by engaging in extensive negotiations there, agreeing to submit to the jurisdiction of its courts to resolve any dispute arising under the agreement, and executing the settlement agreement there, the defendants had "transacted business" within the meaning of the state long-arm statute and had purposefully availed themselves of the privilege of conducting activities in New York. *Id.* at 166-67. It also noted that settling a civil lawsuit seeking compensation for healthcare costs was a business transaction. *Id.* at 167. It concluded that there was no reason why it should not view the agreement's negotiation and execution as it would those of an ordinary commercial contract. *Id.* It also found that there was a sufficient nexus between the New York negotiations and the plaintiffs' cause of action because the suit challenged not only the statutes enacted pursuant to the agreement but the agreement itself. *Id.* Finally, it found that the defendants could

reasonably have anticipated being haled into court in New York because the negotiations had been conducted there. *Id.*

The defendant public officials in *Grand River* could not have been found to be subject to personal jurisdiction in New York under the "effects" test because there was no evidence that they had engaged in conduct that was intended to or was at least highly likely to cause serious harm or injury in New York. Yet the court found that they were subject to personal jurisdiction there based on other considerations to which the facts of the case gave rise.

Given this Court's admonition that courts must determine the propriety of exercising personal jurisdiction based on the facts of each case, *Kulko*, 436 U.S. at 92, there is no reason why courts should be limited to applying the "effects" test in § 1983 actions. *See, e.g., Kidwell*, 577 F.2d at 1267, 1269 n.28 (noting that "the existence of personal jurisdiction turns upon the facts of each case" and that whether a defendant has, for example, benefited from the forum State's laws is simply a factor for the court to consider and "to discount if the benefit is attenuated or speculative"). More importantly, the § 1983 cases that Stroman has cited establish that the courts have relied on differing factors in those cases to determine whether personal jurisdiction over the nonresident public officials was proper based on differences among the facts of the cases themselves and not based on any legal dispute as to the proper standard to apply in such cases. Distinctions that are the result of such

factual differences do not establish any conflict among the circuit courts that requires this Court's attention.

B. Stroman's Assertion that the Fifth Circuit Added an Unwarranted Economic Criterion to the Test that It Applied Is Based upon Stroman's Erroneous Assumption that Only the *Calder* "Effects" Test Should Govern the First Step of the Personal-Jurisdiction Analysis in § 1983 Actions.

Stroman asserts that the Fifth Circuit added an unwarranted economic criterion to the test that it applied. Pet. at 11, 18-21. This assertion makes sense only if one assumes as Stroman does that the *Calder* "effects" test establishes the only criteria that courts can apply to determine whether the first step of the personal-jurisdiction inquiry is met in § 1983 actions against nonresident public officials. This is not the case. Courts may also consider whether the defendant has engaged in "some act by which [he] purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253. *See* Pet. at 16.

Contrary to Stroman's assertion, Pet. at 18 and 21, the Fifth Circuit did not state in the present case that where the *Calder* "effects" test is met, plaintiffs must also demonstrate that the public official's conduct satisfies the *Hanson* test. Nor did it state, as

Stroman asserts, Pet. at 10, that the "effects" test did not apply in § 1983 actions. It instead applied the "effects" test and the *Hanson* test separately and said that the actions that the Commissioner had taken did not establish that Texas's exercise of jurisdiction over her was proper under either test. Pet. App. 11a-12a, 14a-15a.

The Fifth Circuit explained that courts normally exercise specific jurisdiction "over nonresident defendants that are engaged in commercial, profit-oriented enterprise[s]." Pet. App. 12a. It further explained that in *Kulko*, this Court stated that a defendant's conduct could not fairly be analogized to the conduct of the defendants in the commercial activity cases if the defendant had not engaged in any "'commercial transactions in interstate commerce'" from which he "'sought a commercial benefit.'" Pet. App. 12a (quoting *Kulko*, 436 U.S. at 97). The Fifth Circuit observed that the Commissioner's actions in the present case should not be analogized to those of the defendants in the commercial cases; although she had "reached out to assert her authority over Stroman's Arizona-related business activities" by issuing a cease-and-desist letter and corresponding with Stroman's attorneys, she had not by those actions "purposefully availed herself of the benefits of Texas law like someone actually doing business in Texas" would have. Pet. App. 11a (internal quotation marks omitted). The court further noted that the Commissioner had not "engaged in commercial transactions to obtain a commercial benefit" either. Pet. App. 13a.

Having concluded that the actions the Commissioner had taken did not establish that Texas's exercise of personal jurisdiction over her was proper under the test normally used in commercial cases, the court discussed its reasons for finding that her actions did not establish that the exercise of jurisdiction was proper under the "effects" test that is used in tort cases either. Pet. App. 13a-15a. It did not state that the "effects" test included any inquiry as to whether a defendant was doing business or obtaining an economic benefit. Pet. App. 13a-15a. Thus, Stroman's assertion that the court added an unwarranted economic criterion to the test that it applied is incorrect.

Stroman contends that the Sixth Circuit also added an unwarranted economic criterion to the test that it applied in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992). Pet. at 18-19, 21. That case concerned disposal sites for low-level radioactive waste. Only three States had such sites. *Id.* at 1175. Congress enacted legislation that required those three States to continue to accept such waste from the other States for a fixed period and required the other States to begin to assume the burden of disposing of their own waste. *Id.* When the three States that had the sites perceived that Michigan was not complying with the federal legislation, they wrote letters to and telephoned Michigan public officials, legislators, and radioactive waste generators threatening to refuse to accept any waste from Michigan if it did not enact the

legislation necessary to comply with the federal requirements. *Id.* at 1176. After they eventually did refuse to accept any waste from Michigan, a Michigan association whose members generated radioactive waste sued the officials who administered the sites in each of the three States in federal district court in Michigan. *Id.* at 1175.

The Sixth Circuit held that there was no evidence that the defendants had purposefully availed themselves of the benefit of Michigan law because their compliance with federal law should not be construed as purposeful action. *Id.* at 1177. It further held that the defendants' telephone calls and letters were not sufficient to establish purposeful availment or to constitute "evidence of threshold activity in a forum state." *Id.* It also noted that the defendants had never solicited any business in Michigan or induced it to use the disposal sites in their States and that their States had not undertaken any economic activity in Michigan related to the sites. *Id.* It observed that it was actually the association that had availed itself of the privileges of doing business in the defendants' States. *Id.* It did not discuss the *Calder* "effects" test in the first step of its personal-jurisdiction analysis. *See id.* at 1177.

The Sixth Circuit could properly consider whether the nonresident officials had engaged in any economic activity in the forum State or gained any economic benefit from their forum-related contacts. In contending that the Fifth Circuit's decision in the present case and the Sixth Circuit's decision in

Griepentrog added an unwarranted economic criterion to their analyses, Stroman fails to recognize that these are the only two § 1983 cases other than *Kidwell* that it cites in which the nonresident public officials were simply enforcing state or federal law without more. Their analyses are similar because their facts are similar. Given their facts, it was appropriate to discuss all of the factors that might have subjected the officials to jurisdiction but that were not present, including economic ones. Similarly, that the cases in which the "effects" test would support a finding that the exercise of personal jurisdiction over a nonresident public official in a forum State might not discuss the absence of any economic benefit from the officials' activities in the forum State is a reflection of differing fact patterns, not of any conflict or confusion as Stroman claims, *see* Pet. at 21.

Although Stroman asserts that the Fifth Circuit "created a jurisdictional standard unique to State actors in Section 1983 cases," Pet. at 12, it has not cited any case other than *Kidwell* in which a court has applied an "effects" type of test in a § 1983 action to find that the exercise of personal jurisdiction over a nonresident public official who was enforcing state law, without more, was proper. The *Kidwell* court, moreover, did not limit its inquiry to an "effects" type of analysis. It also applied the *Hanson* test, just as the Fifth Circuit did in the present case and the Sixth Circuit did in *Griepentrog*. *Kidwell*, 577 F.2d at 1268-69. It also stated that the "business" of the nonresident public official's State "[was] to regulate" and that

the State "was conducting that business" in the forum State. *Id.* at 1268. It therefore analogized the State's conduct to that of an insurance company sending an insurance contract and premium notices into the forum State. *Id.* In evaluating the personal-jurisdiction issue, it recognized that such evaluations must be based on the facts of each individual case and that courts could put greater or lesser weight on the factors to be considered depending on those facts. *Id.* at 1269 n.28. Although the ultimate conclusion in *Kidwell* differed from that in the present case and in *Griepentrog*, the basic framework of its inquiry was the same. The Fifth Circuit explained its refusal to follow *Kidwell* by correctly noting that subsequent decisions of this Court had "overtaken" each component of *Kidwell* and that those decisions were controlling. Pet. App. at 21a-22a.

Stroman contends that "adding additional criteria before jurisdiction over state officials can be found" also conflicts with cases from the Second Circuit such as *Grand River*. Pet. at 19. It maintains that in finding that the exercise of personal jurisdiction in New York over the state attorneys general who had negotiated the master settlement there was proper, the court did not impose any requirement that the state officials financially benefit from the transaction. *Id.* at 20. But this does not demonstrate a conflict – whether it is appropriate to discuss the presence or absence of certain factors depends on the facts of the particular case. Moreover, the *Grand River* court recognized that there was an economic

aspect (if not a commercial one) to the settlement. It stated that "[s]ettling a civil suit seeking compensation for, *inter alia*, healthcare costs is a business transaction." 425 F.3d at 167. It therefore saw no need to view the settlement "any differently than an ordinary commercial contract." *Id.*

Stroman also cites *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), for the proposition that adding economic criteria conflicts with Second Circuit cases. Pet. at 20. Again, whether discussing the presence or absence of certain factors is appropriate depends on the facts of the particular case. In *Kronisch*, the plaintiff had sued the United States and two Central Intelligence Agency (CIA) officials in their official and individual capacities alleging that while in Paris, he had been a victim of a CIA program that administered lysergic acid diethylamide (LSD) to unsuspecting persons in the United States and abroad. *Id.* at 116. The court found that during several trips to New York, the defendant at issue had discussed becoming involved with the program with persons who were administering it, that persons who were administering the program in New York regularly reported the results of their research to him, and that he might have taken LSD himself in New York while one of the people administering the program was present. *Id.* at 130-31. The court concluded that these contacts, which laid the groundwork for the LSD program that the plaintiff claimed to have been a victim of while in Paris, established a prima facie case that the defendant had purposefully

availed himself of the privilege of conducting activities in New York and that the plaintiff's claim arose out of those activities so that the exercise of personal jurisdiction over the defendant in New York was proper. *Id.* at 131. That the court did not specifically address whether the defendant had benefited financially from his contacts with New York does not establish any conflict with cases that do address the presence or absence of a financial benefit from a defendant's activities because that is appropriate under the facts presented.

Thus, Stroman has not established that the Fifth Circuit's analysis of economic criteria in this case conflicts with the decisions of other circuits.

C. Stroman's Assertion that Courts Should Consider Only the Factors that the Forum State's Long-Arm Statute Identifies in Determining Whether the Exercise of Personal Jurisdiction Is Proper Is Also Based Upon Stroman's Erroneous Assumption that Because § 1983 Actions Are Treated as Torts for Some Purposes, They Must Invariably Be Treated as Torts for Purposes of the Personal-Jurisdiction Inquiry.

Stroman asserts that in determining whether personal jurisdiction over nonresident public officials in § 1983 cases is proper, courts should consider only those factors that the state long-arm statute identifies. Pet. at 19. This is premised upon Stroman's

erroneous assumption that because § 1983 actions are treated as torts for some purposes, they must invariably be treated as torts for purposes of the personal-jurisdiction inquiry. As previously discussed, cases such as *Grand River* belie that theory. Moreover, while the two major steps of the personal-jurisdiction inquiry may conflate into a single step if the state long-arm statute authorizes service to the full extent that Fourteenth Amendment due-process considerations permit, Stroman has not cited any authority for the proposition that the scope of the due-process inquiry is somehow limited by scope of the long-arm statute. The two requirements serve different purposes.

A court must have jurisdiction over a defendant's person to adjudicate a claim against or to impose an obligation upon a defendant personally. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). This requirement stems from the Due Process Clause, which protects an individual's liberty by imposing this restriction on judicial power. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). A court cannot exercise personal jurisdiction over a defendant until the procedural requirement of properly serving the defendant with summons has been met. *Id.* Federal courts are courts of limited jurisdiction. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Unless the defendant consents to service, a federal court must therefore have authorization to serve him. *See Omni*, 484 U.S. at 104. Rule 4 of the

Federal Rules of Civil Procedure normally governs service of process in the federal courts. *Id.* Where the federal act in question does not authorize service of process, Rule 4(e) directs district courts to the long-arm statute of the State in which the district court sits. *Id.* at 108. Rule 4(e)(1) states that unless federal law provides otherwise, individuals may be served in any federal judicial district in accordance with the law of the State in which the district court is located.

Once a court determines that the state long-arm statute authorizes service under the particular circumstances in question, it must then determine whether the exercise of personal jurisdiction comports with due-process requirements. *Grand River*, 425 F.3d at 165. If the state long-arm statute authorizes service to the full extent that due process permits, then the two inquiries conflate into a single inquiry. *Griepentrog*, 954 F.2d at 1176. But nothing that Stroman has cited establishes that the factors that the state long-arm statute lists somehow limit the factors that a court can consider in deciding whether a defendant has the requisite minimum contacts with the forum to ensure that the exercise of personal jurisdiction over him "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

Stroman also states that in *Grand River*, the court relied solely on the State's long-arm statute to determine whether New York could properly exercise personal jurisdiction over the nonresident public

officials. Pet. at 11, 20. It contends that this supports its position that there is confusion in the circuit courts concerning the standard to apply in determining whether the exercise of personal jurisdiction over nonresident public officials in § 1983 actions is proper. *Id.* at 11, 20. However, the Second Circuit expressly acknowledged in *Grand River* that it had to determine both whether the long-arm statute established jurisdiction over the defendants *and* whether the exercise of jurisdiction comported with federal due-process requirements. 425 F.3d at 165.

Although New York's long-arm statute does not extend to the limits of due process, *see Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244 (2d Cir. 2007), some aspects of the Second Circuit's inquiry under the long-arm statute tracked the steps of the due-process inquiry – i.e., whether the defendants had purposefully availed themselves of the privilege of conducting activities in New York, thereby invoking the benefits and protections of New York law, and whether a substantial nexus existed between the defendant's forum-related activities and the plaintiffs' cause of action (i.e., whether the cause of action arose out of the negotiations). *Grand River*, 425 F.3d at 166-67. These are the first two steps of the three-step due-process analysis that the Fifth Circuit applied in this case. Pet. App. 10a-11a. There was no reason for the *Grand River* court to repeat these steps in its due-process analysis when it had already discussed them in conjunction with the long-arm statute. It did address the third step – whether the exercise of

personal jurisdiction was fair and reasonable, *see* Pet. App. 11a – by noting that because the negotiations in question had been carried out in New York, it was foreseeable that the officials would be subject to suit there. 425 F.3d 167. It clearly was addressing the due-process inquiry at this point because it cited the portions of this Court's *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), and *Burger King*, 471 U.S. at 474, decisions in which the Court stated that the crucial foreseeability inquiry in the due-process analysis is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 425 F.3d at 167. Thus, *Grand River* does not establish that there is any confusion among the circuit courts in this respect either.

D. The Fifth Circuit Correctly Refused to Find that Texas's Exercise of Personal Jurisdiction over the Commissioner Was Proper Under the "Effects" Test, Based in Part on the Concern that Such a Ruling Would Subject Public Officials Who Simply Ordered a Nonresident Defendant to Comply with State Law Before Doing Business in the State to Suit in a Multitude of Forums.

Stroman contends, Pet. at 21-22, that the Fifth Circuit erred in refusing to find that Texas's exercise of personal jurisdiction over the Commissioner was proper, based in part on its concern that such a ruling

would potentially subject any state official enforcing his State's laws to suit in any State where the validity of his State's laws was questioned, Pet. App. 16a-19a. The Fifth Circuit correctly perceived that under Stroman's theory, a nonresident could assert that personal jurisdiction existed in his home State over a public official who had, without more, ordered him to comply with state law as a prerequisite to conducting business in the official's State. Assuming that the requirements of the state long-arm statute were satisfied, the plaintiff would only have to allege in a § 1983 action that the law in question was unconstitutional and that its enforcement had harmed him in the forum State. The Fifth Circuit properly noted that the fact that the plaintiff alleged injury in the forum State, even from an intentional tort, was not sufficient to establish that the exercise of personal jurisdiction was proper. Pet. App. 14a. If that were enough, plaintiffs would always, as the court feared, be able to hale nonresident public officials into court in their home States because they would always feel the effects of the challenged legislation there. The Fifth Circuit's refusal to authorize the exercise of personal jurisdiction on this basis comports with this Court's statement that even foreseeable injury is not "'a sufficient benchmark' for exercising personal jurisdiction" and that the critical inquiry is whether "'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295, 297).

The Fifth Circuit correctly determined that by simply ordering an out-of-state resident to comply with state-law prerequisites for doing business in his State, a public official does not manifest the intent to cause injury or harm in the forum State or the purposeful direction of tortious conduct at the forum State that the *Calder* test requires. Pet. App. 14a-15a. It also correctly determined that such conduct does not establish that the nonresident official has purposefully availed himself of the privilege of conducting activities in the forum State as the *Hanson* test requires. Pet. App. 11a-12a. It therefore concluded that the Commissioner's mailing of the cease-and-desist order and the correspondence with Stroman's attorneys did not constitute sufficient minimum contacts with Texas to enable her to reasonably foresee that she could be haled into court there. Pet. App. 12a.

In declining to establish the broad principle that would permit a public official who had simply ordered a nonresident to comply with his State's law as a prerequisite to doing business in his State to be subject to suit in any forum in which a plaintiff chose to challenge that law, the Fifth Circuit recognized that a State that has to defend its laws in a another forum "loses the benefit of having the law examined by local or state federal courts – courts that have special expertise interpreting its laws." Pet. App. 17a. Stroman's assertion that this concern is unwarranted because one federal court is as capable as another of resolving federal-law issues, Pet. at 24-25, overlooks

the fact that the federal issue here involves the constitutionality of Arizona's laws. As this Court has recognized, "federal judges sitting in [a State] are better qualified to construe [that State's] law, and to assess the character of [that State's] probable enforcement of that law, than are judges sitting elsewhere." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 186 (1979).

The Fifth Circuit also noted that while Texas has an interest in providing Stroman with a convenient forum in which to redress its grievances, a rule that would permit public officials to be sued in any forum in which a plaintiff chose to file a § 1983 action challenging the enforcement of a state law "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue" that only this Court would be able to resolve. Pet. App. 18a. The Fifth Circuit further noted that if the constitutionality of the challenged laws in this case was resolved in an Arizona forum, "judicial efficiency and uniformity [would] prevail." *Id.* This result would also preserve the certainty that final decisions by the federal courts sitting in a State normally provide a State.

It is also true that while having to defend one attack on the constitutionality of a state law in another forum might not impose a substantial practical or economic burden on a State, having to defend a multiplicity of attacks on state law in other forums certainly could impose such a burden. This is particularly true if the susceptibility to such attacks could be caused simply by ordering nonresidents to comply

with state law before doing business in the State. Having to choose between enforcing state law and shouldering the burden of defending a multitude of lawsuits in other forums would put States in an untenable position. This position would be particularly unfair because as the Fifth Circuit observed in this case, Pet. App. 15a-16a, and the Sixth Circuit observed in *Griepentrog*, 954 F.2d at 1177, the plaintiffs in such cases have usually decided unilaterally to avail themselves of the privilege of doing business in the State and the State is "simply attempting to uniformly apply its laws," Pet. App. 16a.

The Fifth Circuit also noted that Arizona has "a strong interest in not having an out-of-state court evaluate the validity of its laws." Pet. App. 18a. This is perhaps particularly true where the laws at issue protect the State's consumers or regulate transactions involving property within a State's borders as Arizona's real estate licensing laws do here. As the Fifth Circuit observed, Texas has comparatively little interest in resolving disputes over the validity of Arizona's statutes. Pet. App. 17a.

The Fifth Circuit grounded its decision in part on federalism concerns, citing *World-Wide Volkswagen*, 444 U.S. at 292-94. Pet. App. 17a-19a. In *Insurance Corp. of Ireland,* 456 U.S. at 703 n.10, this Court stated that the restrictions on the courts' power that it discussed in *World-Wide Volkswagen* "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" (which is "the only source of the personal jurisdiction requirement" and which does

not mention federalism concerns) rather than as independent limitations on the courts' sovereign powers stemming from federalism concerns. Commentators have nevertheless observed that despite this statement "it does not seem plausible to read territoriality and sovereignty concerns entirely out of minimum contacts analysis," given that "the states to which [the Fourteenth] Amendment applies are coequal sovereigns within a federalist system, and the Amendment must be read with this in mind." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1067.1 (3d ed. 2002).

Stroman cites *St. Croix Waterway Ass'n v. Meyer*, 942 F. Supp. 435 (D. Minn. 1996), and *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367 (2d Cir. 2005), for the proposition that when a State attempts to regulate activity outside its borders and within the boundaries of another State, it is reasonable for the latter State to exercise jurisdiction over the regulating State. Pet. at 22-23. These cases are distinguishable from the present one.

The *St. Croix Waterway Ass'n* case arose out of the Wild and Scenic Rivers Act that Congress enacted to protect certain waterways, in part through state and federal cooperative agreements and interstate compacts. 942 F. Supp. at 437. Pursuant to the Act, Minnesota and Wisconsin enacted legislation that authorized having the Lower St. Croix River included in the Federal Wild and Scenic Rivers System and directed that their Natural Resource Commissioners

join the Secretary of the Interior in drafting a comprehensive master plan and that they promulgate rules for the river's regulation and administration. *Id.* at 438. An association of persons who operated motorboats on the river sued the Wisconsin and Minnesota officials responsible for enforcing the regulations at issue in federal district court in Minnesota seeking a declaratory judgment that the regulations were unconstitutionally vague. *Id.* at 437-39. The Wisconsin official challenged the court's exercise of personal jurisdiction over him. *Id.* at 440.

The court noted that the two States had consciously decided to administer their respective sides of the river jointly pursuant to federal law, that they had adopted identical regulations applicable to both States' waters, and that each State could enforce the regulations without regard to the State in which the alleged violation occurred. *Id.* at 441. It concluded that the Wisconsin official's contacts with Minnesota were "qualitatively and quantitatively substantial, pervasive and purposeful." *Id.* It noted that it was not the plaintiff's conduct that had caused the official's contact with Minnesota, but the official's own conduct, given that Wisconsin's regulations had been "purposefully directed at Minnesota waters" in the river. *Id.*

The Wisconsin official in that case had many more numerous and substantial contacts with the forum State than a public official who has simply ordered a nonresident by mail to comply with state law as a prerequisite to doing business in his State

has had. The case therefore provides no support for the proposition that Texas's exercise of personal jurisdiction over the Commissioner in the present case would have been proper, and it in fact helps to illustrate by comparison why such an exercise would have violated due-process principles.

Dairy Mart involved a suit that a convenience store chain filed in federal bankruptcy court in New York against Kentucky officials who were responsible for managing a fund created to assist underground petroleum storage tank owners and operators to meet their cleanup responsibilities under a federal act. 411 F.3d at 369. Since the case discusses only Eleventh Amendment and *Ex parte Young*, 209 U.S. 123 (1908), principles, it provides no support for the proposition that Texas's exercise of personal jurisdiction over the Commissioner in the present case would have comported with due-process principles.

Thus, none of the cases that Stroman cites establish that the Fifth Circuit erred in determining that the Commissioner lacked the minimum contacts with Texas necessary to subject her to suit there in accordance with such principles.

II. This Court Should Not Consider Which Due-Process Analysis Applies in Federal-Question Cases Once the Forum State's Long-Arm Statute's Criteria Are Met Because That Issue Was Neither Raised nor Considered Below.

This Court should not consider which due-process analysis applies in federal-question cases once the forum State's long-arm statute's criteria are met, *see* Pet. at 25-30, because Stroman did not raise that issue below and the Fifth Circuit did not consider it. *See* Appendix to this Brief in Opposition; Pet. App. 1a-22a. This Court normally does not consider issues that were neither raised nor considered below. *Travelers Cas. & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, ___ U.S. ___, ___, 127 S. Ct. 1199, 1207 (2007). In *Fry v. Pliler*, ___ U.S. ___, ___, 127 S. Ct. 2321, 2327 (2007), the Court granted review to consider what standard governed a particular issue. The petitioner subsequently argued that the lower court had erred in its application of the standard that it did apply. *Id.* This Court refused to consider that argument. *Id.* at 2327-28. In the present case, Stroman argued that personal jurisdiction could properly be exercised over the Commissioner based on a Fourteenth Amendment due-process analysis. *See* Appendix to this Brief. It now argues for the first time in this Court that a different standard – a Fifth Amendment due-process analysis – should instead apply. Pet. at 25-30. This is essentially simply the reverse of the situation in *Fry*, and the Court should not consider the new issue in this case either.

III. This Court Should Not Consider Whether the Due Process Clause Applies in the First Instance in Actions Against Public Officials in Their Official Capacities Because That Issue Was Neither Raised nor Considered Below.

This Court should not consider whether the Due Process Clause applies in the first instance in actions against public officials in their official capacities, *see* Pet. at 30-34, because Stroman did not raise that issue below and the Fifth Circuit did not consider it. *See* Appendix to this Brief in Opposition; Pet. App. 1a-22a. The authorities cited and the rationale provided for refusing to consider the other issue that Stroman is raising for the first time in this Court, *see supra* at 33, apply here as well.

In addition, if Stroman had raised this issue below, the Commissioner would have argued that accepting Stroman's position on the issue would have constituted grounds to dismiss this action. The Eleventh Amendment guarantees that private individuals cannot sue unconsenting States in federal court. *Bd. of Trustees v. Garrett*, 531 U.S. 356, 363 (2001). This bar applies regardless of the relief sought. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Thus, Arizona is entitled to Eleventh Amendment protection from Stroman's suit. Stroman cannot obtain the benefit of the *Ex parte Young* doctrine to avoid the Eleventh Amendment bar

yet discard the fiction to strip the Commissioner of her right to protection under the Due Process Clause.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STROMAN REALTY, INC., Plaintiff, v. ELAINE RICHARDSON, Defendant.	Civil Action No. H-05-1203 (Judge Kenneth M. Hoyt) (Filed Oct. 12, 2005)

STROMAN REALTY, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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* * *

Further, Arizona's administrative cease and desist order has no effect on Stroman's claims in this action to enjoin Arizona's unconstitutional extraterritorial enforcement efforts. Stroman has never conducted activities in Arizona that would give Arizona jurisdiction to regulate Stroman, and an order issued absent jurisdiction is void. In addition, claim preclusion does not apply to a judicially unreviewed administrative order, such as Arizona's. It certainly does not apply where, as here, the administrative process is inadequate to hear Stroman's § 1983 claims or to grant the permanent injunctive relief Stroman seeks in this case. Finally, even if applicable, the cease and desist order has no effect on Stroman's ability to seek prospective relief to enjoin Arizona's continued unconstitutional enforcement efforts.

ARGUMENT

I. This Court has Jurisdiction Over Defendant.

Arizona claims that this court does not have jurisdiction, asserting that Arizona does not have minimum contacts with Texas and has not directed sufficient activities relating to this lawsuit toward Texas to support jurisdiction under the due process

clause. Az. Mem. at 8-10. To the contrary, Arizona has reached into the State of Texas to impose Arizona law and regulations on Texas citizens based on activities Stroman conducts solely in Texas.

When the court does not conduct an evidentiary hearing on a defendant's motion to dismiss, the party seeking to assert jurisdiction "is required only to present sufficient facts to make out a prima facie case supporting jurisdiction." *Central Freight Lines, Inc. v. APA Transport Corp.*, 322 F.3d 376, 380 (5th Cir. 2003); *accord Guidry v. United States Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999). "The court shall accept as true that party's uncontroverted allegations . . . and resolve all factual conflicts in favor of the party seeing [sic] to invoke the court's jurisdiction." *Id.*

The general due process considerations under which a nonresident can be subject to personal jurisdiction is set forth in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985). A nonresident must engage in such activities that he is deemed to have fair warning that his activity may subject him to the jurisdiction of the foreign state. *Id.* at 472, 105 S.Ct. at 2182. This requirement is met if defendant has purposefully directed his activities at residents of the forum and the litigation relates to those activities. *Id.* Parties who reach out beyond their own state and create continuing relationships or obligations with residents of another state are subject to jurisdiction in the other state for the consequences of their activities. *Id.* at 473, 105 S.Ct. at 2182.

The due process clause is not a shield to use to avoid the consequences of interstate obligations voluntarily assumed by defendant. *Id.* at 473-74, 105 S.Ct. at 2183. Where defendant has deliberately engaged in activities within a state or created obligations between himself and residents of the forum, it is not unreasonable to require him to litigate in that forum. *Id.* at 475-76, 105 S.Ct. at 2184. A single act can support jurisdiction and physical presence is not required. *Id.* at 475 n.18, 476, 105 S.Ct. at 2184 n.18, 2184.[5]

The deprivation of constitutional rights is treated as a tort for the purposes of determining minimum contacts. *Ziegler v. Indian River County,* 64 F.3d 470, 473-74 (9th Cir. 1995) (jurisdiction for Section 1983 claim is analyzed under a tort standard); *c.f., Bagg v. Univ. of Texas Med. Branch*, 726 S.W.2d 582, 584 n.1 (Tex. App. 1987). A tortfeasor has minimum contacts

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[5] *Bullion v. Gillespie,* 895 F.2d 213, 216 (5th Cir. 1990) ("It is well settled that specific jurisdiction may arise without the nonresident defendant's ever stepping foot upon the forum state's soil or may arise incident to the commission of a single act directed at the forum."); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 332-34 (5th Cir. 1982), *cert. denied,* 460 U.S. 1023, 1035 S.Ct. 1275 (1983) (holding that district court had jurisdiction over defamation defendant who initiated defamatory telephone call to Mississippi which caused injuries in Mississippi); *Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment,* 923 F.Supp. 950, 955-56 (S.D. Tex. 1996) (sending letter into Southern District of Texas accusing television producers of violating trademark and copyright law was sufficient to warrant jurisdiction there for copyright/trademark infringement claim, libel claim and unfair competition claim).

with a state if he performs acts directed at the forum state which cause harm that the defendant should have anticipated would be suffered in the forum state. *Ziegler,* 64 F.3d at 474; *see Calder v. Jones,* 465 U.S. 783, 788-90, 104 S.Ct. 1482, 1486-87 (1984) (effect of defendant's Florida conduct in California made jurisdiction in California proper). It is well settled that the Texas long arm statue [sic] extends as far as federal due process requirements allow. *Central Freight Lines, Inc.*, 322 F.3d at 380.

Arizona's argument that its conduct was not aimed at Texas and its conduct in Texas was not sufficient for it to anticipate that it would be sued in Texas ignores the allegations of the complaint and the nature of Arizona's conduct. As described supra and in the Amended Complaint, Stroman is a Texas corporation, is licensed in Texas, has its only business office in Texas, all of its employees are in Texas and does all of its business by internet, telephone and mail from its Texas office. All contracts between Stroman and its customers are accepted by Stroman in Texas and all funds received in Texas. The choice of law provision in Stroman's contracts typically provide that they will be governed by Texas law. Am. Comp. ¶ 28. Thus, any activities that would be regulated by a real estate licensing authority are performed exclusively in the state of Texas.

In contrast, Arizona has reached beyond its borders to apply its laws and regulations to Stroman and its customers in Texas. Arizona has taken the position that Stroman and its salespersons are required to

obtain Arizona broker's and salesperson's licenses and comply with all of Arizona's laws and regulations if Stroman conducts activities with respect to timeshare resales that if the timeshare is located in Arizona, regardless of the residence of the potential buyer or seller or if it advertises Arizona timeshares on the internet. *Id.* ¶ 32. Arizona also purports to limit Stroman's communications with non-residents who have Arizona timeshare interests, (Ex. 11 to Am. Comp. at 4) and to regulate Stroman's contact with Arizona residents even when the timeshare is located elsewhere. *Id.* at 2-3.[6] Arizona's Department of Real Estate has contacted Stroman and sent correspondence to Stroman's counsel in Texas insisting that Stroman obtain an Arizona real estate license before conducting these activities. Ex. 10 to Am. Comp. Moreover, it has issued an administrative cease and desist order, which it served on Stroman in Texas and asserting that Arizona has the authority to impose such an order against Stroman for these activities and that it has the authority to haul Stroman into Arizona to defend itself against an administrative proceeding.

By its actions, Arizona has reached into Texas to impose its regulatory scheme on Stroman, not for business it does in Arizona, but for business it does in Texas. For example, every time a Texas resident calls

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[6] Arizona's cease and desist order alleges Stroman conducted activities with respect to timeshares located in Nevada, California and Colorado.

Stroman about an Arizona timeshare property, Stroman is under threat of penalties for actions taken in Texas. If Stroman enters into its standard registration/advertising agreement, which is a personal service contract,[7] with a Texas resident and the timeshare interval is in Arizona, Arizona claims Stroman is subject to penalties even though the owner is a Texas resident. If Stroman accepts payment for its registration/advertising services from a Texas resident, it must maintain copies of documents pertaining to the transaction in Arizona, and also must store copies of employment records for its Texas employees in Arizona. Am. Comp. ¶ 42. Stroman is subject to discipline even when the parties have agreed that their contract will be governed by Texas law. *See* Exhibit 11 to Am. Comp. at 3.

This court's decision in *Stroman Realty, Inc. v. Antt* is directly on point. In finding that the court had jurisdiction over the Florida and California licensing officials who had insisted Stroman's licensure was required in those states, the court observed that the defendants were:

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[7] *Coldwell Banker & Co., et al. v. Karlock*, 686 F.2d 596, 599 (7th Cir. 1982) ("[a] real estate brokerage contract is generally characterized as a contract for personal services rather than a contract conveying an interest in land"); *Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 123, 33 S.Ct. 69, 72 (1912) (rejecting claim that Colorado law applied to contract for sale of land drafted in Minnesota because it involved Colorado property because the contract was "strictly personal" and "[i]t in no way affects the land or seeks any remedy against it.").

> seeking to regulate the business of a South-Texas land dealer and his numerous South-Texas customers. The individual officers are asserting a nationwide authority to regulate business, and they are applying their authority against a Texan in Texas. The statutes in question are neither consumer protection measures, nor land title regulations: they are – pure and simple – broker regulations. A federal court sitting in Houston is a reasonably logical place to litigate a federal constitutional question arising from the officers' attempt to impose their power on a Texan.

20 F. Supp.2d at 1053. The court noted that California had sent cease and desist letters to Stroman and that Florida had written to Stroman demanding that it disclose documents. "These activities in Texas are not fortuitous or attenuated; they are part of a deliberate effort to exert the officers' authority in Texas." *Id.*

As with Florida and California, Arizona has reached into Texas to impose its laws and regulations on Stroman and its customers. Arizona purports to control the full scope of Stroman's relationship with anyone that owns, buys, sells, or seeks to buy or sell a timeshare located in Arizona, as well as Stroman's communications with Arizonans who have timeshare interests outside the state. Arizona has attempted to force this Texas business to obey Arizona law in Texas by having Arizona regulatory officials send cease and desist letters to Stroman and Arizona should have anticipated that the harm caused by its acts directed

at Texas would have an effect on Texas residents. Jurisdictional minimum contacts have been established.[8]

Asserting jurisdiction over Arizona in this forum also comports with notions of fair play and substantial justice. Although Arizona claims that Stroman is subject to its jurisdiction in Arizona, where Stroman has no office or employees, Arizona asserts that it cannot be sued in Texas. As the court previously recognized:

> This is double-speak. On the one hand [defendants] argue they may regulate Stroman even though it is from a different state, and even though it has only tenuous connections with their states. On the other hand, they argue that this court does not have

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[8] Arizona's citation to *Hildebrand v. Steck Mfg. Co., Inc.*, 279 F.3d 1351 (Fed. Cir. 2002), is irrelevant. Az. Mem. at 11. In that case, the court applied Ohio's long-arm statute, which, unlike the Texas statute, "does *not* grant" the state's "courts jurisdiction to the limits of the fourteenth amendment." 279 F.3d at 1355 (emphasis added). Moreover, unlike the warning letters sent by the patent holder in *Hildebrand,* Arizona's contacts with Stroman are part of an effort to exert continuing regulatory control over Stroman's business in Texas. This same distinction likewise sets Stroman's case against Arizona from *Jarrett v. State of North Carolina,* 868 F.Supp. 155 (D.S.C. 1994). Az. Mem. at 11. There, a recent South Carolina resident, formerly of North Carolina, sued a North Carolina licensing board for releasing his file by mail to a third party in South Carolina. Unlike this single, isolated contact that completed the alleged tort, Arizona's demands that Stroman comply with Arizona law in Texas are an ongoing constitutional violation.

> jurisdiction over them because they are from different states, and because they have only tenuous connections with this state. They cannot have it both ways. They can't have their cake and eat it too. . . . These aphorisms about double standards and reciprocity are not often jurisprudential, but they articulate an aspect of fair play and substantial justice.

20 F. Supp.2d at 1054. Moreover, Arizona seeks to regulate transactions even where no party is an Arizona citizen. Again, in finding jurisdiction over California and Florida was appropriate, the court found it compelling that:

> [B]oth states seek to enforce their statutes in situations that involve only non-residents as long as the land is in the state. For example, Florida might try to regulate an Oklahoman's selling a Nebraskan a Miami timeshare through a Kansan as a broker, and California might try to regulate a South Dakotan's selling a Marylander a Napa Valley timeshare through a Wisconsin broker. . . . Under their view of the scope of their authority, they would also be able to regulate a Filipino's selling a Belgian an Orlando or San Francisco timeshare through a Pakistani broker.

Id. at 1054. Here, too, requiring Arizona to defend the constitutionality of its regulatory overreaching in the forum to which it directed these efforts comports with notions of fair play and substantial justice.

Jurisdiction is appropriate for other reasons as well. In determining whether finding jurisdiction is consistent with fair play and substantial justice, the court considers the "interstate judicial system's interest in obtaining the most efficient resolution of controversies." *Burger King,* 471 U.S. at 476-77, 105 S.Ct. at 2184-85. This case presents essentially a single legal issue, whether Arizona is prohibited by the Commerce Clause from applying its real estate licensing laws to Stroman's interstate business of timeshare resales. This is an important question because application of these local laws threatens the viability of the interstate resale market and the viability of Stroman's business. It is the same question Stroman raises in its litigation against Illinois, and which it raised previously in its case against Florida and California. Judicial efficiency is served if the answer to this question is decided in one jurisdiction to avoid the possibility of inconsistent results on basically the same facts. Stroman's burden also will be significantly less if it has to litigate only in one jurisdiction. Stroman's interest in obtaining convenient and effective relief will be served if this case proceeds in Texas. See *Burger King,* 471 U.S. at 476-77, 105 S.Ct. at 2184-85. Texas also has a significant interest in adjudicating the dispute. Texas residents are being deprived of the right to select their own real estate agent and rely on Texas law by the projection of Arizona law into Texas's sovereign territory. *Id.* Stroman's allegations establish that personal jurisdiction over Arizona is proper, and that jurisdiction is

fully consistent with the fairness considerations stated in *Burger King*.

II. Venue is Proper in the Southern District of Texas.

Venue is proper if "a substantial part of the events or omissions giving rise to the claim" occurred in this district. 28 U.S.C. § 1391(b)(2). If personal jurisdiction is proper, then venue is also proper under 28 U.S.C. § 1391(b)(2). *See* Commentary on 1988 and 1990 Revisions to § 1391, Subdivision B, Clause 3. When moving to dismiss for lack of proper venue, defendant has the burden of demonstrating that plaintiff could not bring suit in this judicial district. *Bounty-Full Ent., Inc.*, 923 F. Supp. at 957. When determining proper venue for a 42 U.S.C. § 1983 claim, venue may be equally correct in two judicial districts under Section 1391(b). *Andrade v. Chojnacki*, 934 F. Supp. 817, 827 n. 18 (S.D. Tex. 1996). However, a court is not obligated to determine the 'best' venue for a cause of action pending before it, but rather must determine only whether or not its venue is proper. *Setco Enter. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994).

In *Andrade*, the estates of the members of the Branch Davidian cult brought federal civil rights claims against Texas, the Texas National Guard, a former Texas governor and federal

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No. 06-20095

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STROMAN REALTY, INC.,
Plaintiff-Appellant,

v.

ELAINE RICHARDSON,
Commissioner for the Department of Real Estate for the State of Arizona,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division
C.A. No. H-05-01203

BRIEF OF PLAINTIFF-APPELLANT, STROMAN REALTY, INC.

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April 18, 2006

ORAL ARGUMENT REQUESTED

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Thus, even under these cases, which involved court orders rather than unreviewed administrative

orders, parties were permitted to challenge ongoing enforcement efforts despite previous adverse findings. Stroman's suit against the Commissioner can be afforded no less latitude. Here, Stroman seeks prospective injunctive relief to preclude the Commissioner's continued unlawful assertion of regulatory authority over Stroman. This is *not* the same claim asserted by the Commissioner in its cease and desist order and that order cannot bar Stroman's commerce clause challenge to the Commissioner's authority. As in *Wooley,* Stroman seeks "to be free from prosecutions for future violations of the same statutes." 430 U.S. at 711. The lower court thus erred when it dismissed Stroman's claim for prospective injunctive relief.

IV. DISMISSAL CANNOT BE UPHELD ON THE ALTERNATE GROUNDS URGED BY THE COMMISSIONER COMMISSIONER BELOW

Although not relied upon by the district court when it dismissed Stroman's case, the Commissioner argued three additional bases for dismissal below: lack of personal jurisdiction; improper venue; and that the statute of limitations barred Stroman's claim because it was aware of the Commissioner's position as of January 2000. None of these arguments supports the lower court's ruling.

A. The District Court Had Jurisdiction over the Commissioner and Venue was Proper in the Southern District of Texas.

Personal jurisdiction over the Commissioner is appropriate here. The deprivation of constitutional rights is treated as a tort for the purposes of determining minimum contacts for personal jurisdiction. *See Simon v. United States,* 644 F.2d 490, 497 (5th Cir. 1981) (applying Louisiana's tort provision of long-arm statute to defendants in plaintiffs claims for constitutional rights violations); *Calder v. Jones,* 465 U.S. 783, 788-90 (1984) (stating that effect of defendant's Florida conduct in California made jurisdiction in California proper). "It is well settled that specific jurisdiction may arise without the nonresident defendant's ever stepping foot upon the forum state's soil or may arise incident to the commission of a single act directed at the forum." *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990).

Here, the Commissioner asserts that Arizona real estate licensing laws apply to Stroman's business activities, which are conducted solely in Texas, and that Stroman is subject to Arizona's statutory scheme even when the transaction involves non-Arizona residents. R 96, 161. In so doing, the Commissioner has reached into Texas to impose Arizona's regulatory scheme on Stroman, and has sent correspondence to Stroman in Texas as part of this illegal assertion of authority. R 156. The Commissioner even contends it has the power to regulate Stroman's relationships with Texas residents. The criteria for the exercise of jurisdiction over the Commissioner are met and

jurisdiction in Texas comports with notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985).

Venue in the Southern District was likewise appropriate. Venue is proper if "a substantial part of the events or omissions giving rise to the claim" occurred in this district. 28 U.S.C. § 1391(b)(2). If personal jurisdiction is proper, then venue is also proper under 28 U.S.C. § 1391(b)(2). *See* Commentary on 1988 and 1990 Revisions to § 1391, Subdivision B, Clause 3.[15]

B. The Statute of Limitations Does Not Bar Stroman's Case.

Nor does the statute of limitations argument bar Stroman's claim. *See* R 341-44. While federal courts look to applicable state court statutes of limitations to determine the time for bringing suits under 42 U.S.C. § 1983, "federal law determines when a civil rights action accrues, and, therefore, when the statute of limitations begins to run." *Perez v. Laredo Junior College,* 706 F.2d

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[15] Even if the lower court had found that the Commissioner met her burden on personal jurisdiction and venue grounds, a transfer of the action, not dismissal, would have been the appropriate course. *See Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 466 (1962) (stating that the language of 28 U.S.C. § 1406(a) is "amply broad enough to authorize transfer of cases" whether or not the court has jurisdiction over the defendant.).

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REPLY BRIEF OF PLAINTIFF-APPELLANT, STROMAN REALTY, INC.

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scheme and place an unconstitutional burden on the interstate timeshare resale market.[7] As in *Wooley v.*

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[7] Applying res judicata to Stroman's commerce clause claims is particularly inappropriate given the nature of Stroman's business, wherein its primary method of marketing timeshares is through a proprietary, online database that makes information concerning individual intervals available to potential customers worldwide. R 92. The effect of the internet on both the interstate market and commerce clause jurisprudence is evolving. *See Am. Booksellers Found. v. Dean,* 342 F.3d 96, 104 (2d Cir. 2003) (observing that "it [is] likely that the internet will soon be seen as falling within the class of subjects that are

(Continued on following page)

Maynard, 430 U.S. 705 (1977), Stroman "seek[s] only to be free from prosecutions for future violations of the same statutes" and the order cannot preclude Stroman's claim for prospective relief. *Id.* at 711.

II. DISMISSAL CANNOT BE UPHELD ON THE ALTERNATE GROUNDS URGED BY THE COMMISSIONER

A. The Arizona Commissioner's Assertion of Authority Over Stroman's Texas Operation Subjects the Commissioner to Jurisdiction and Venue in the District Court

As an alternate ground for affirmance, the Commissioner argues that the lower court lacked personal jurisdiction and that venue in the United States District Court for the Southern District of Texas was improper. A.Br. 51-58. Neither ground is supported and the lower court correctly retained jurisdiction in this case.

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protected from State regulation because they 'imperatively demand[ ] a single uniform rule.'") (Alteration original) (citation omitted). Utilizing an unreviewed, summarily issued cease and desist order based on alleged conduct occurring in the 1990s to prevent Stroman from ever challenging the impact of Arizona's regulatory scheme on this changing market defies common sense.

1. The Commissioner Has Substantial Contacts with the Southern District

The sole ground for defendant's assertion that the lower court lacked personal jurisdiction both here and below was that the Commissioner's contacts were insufficient with the forum to justify the exercise of personal jurisdiction. A.Br. at 53, R 221-23. Thus, the Commissioner claims it is not subject to suit in Texas but:

- Arizona has authority over and can regulate a company based in Texas;
- the Texas company is subject to the laws of Arizona notwithstanding that the Texas company conducts all its business activities in Texas and has no office or employees in Arizona and provides no services in Arizona;
- the Commissioner can require compliance with orders that it sends into Texas; and
- she can regulate contracts executed in Texas among Texans as well as those between a Texan and residents of states other than Arizona.

In short, the Commissioner is free to regulate the Texas based business in Texas but is exempt from suit in Texas. This is not the law.[8]

As acknowledged by the Commissioner, the court's jurisdiction in this case is determined by the Texas long-arm statute which is co-extensive with the limits of the due process clause. A.Br. at 51. This Circuit uses a three part test to address the issue of personal jurisdiction. *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465 (5th Cir. 2006).

> "(1) whether the defendant . . . purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable."

Id. at 469 *(quoting Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985)). After the plaintiff establishes minimum contacts, "the burden of proof shifts to the defendant to show that the exercise of jurisdiction would be unreasonable." *Id.* at 473 (citation omitted). Where, as here, there was no evidentiary

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[8] Arizona does not dispute that the Commissioner is amenable to service of process under the state long arm statute. Fed. R. Civ. P. 4(e), 4(k)1(A); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 105 (1987). Arizona committed its constitutional tort "in whole or in part in" Texas. Tex. Civ. Prac. & Rem. § 17.042(2).

hearing, plaintiff must only establish a prima facie case and all allegations set forth in the complaint must be taken as true. *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 812 (5th Cir. 2006).[9]

The criteria set forth in *Luv N' Care* are met here. The Commissioner has engaged in regulatory acts in Texas by virtue of its assertion of a legal right to dictate the manner of operation of business activities in Texas involving Texans. The Commissioner "purposely directed [her] activities" at residents of the forum and the litigation relates directly to those activities. *Luv N' Care, Ltd.*, 438 F.3d at 469.

Contrary to the Commissioner's assertion, jurisdiction is not based only on the sending of an order into Texas that subjects the Commissioner to jurisdiction. A.Br. at 54. The Commissioner asserts that

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[9] Although not raised as an objection by Arizona, it is not necessary to sue a state official in the official's state of authority if the official commits a tort outside the state. *Nevada v. Hall*, 440 U.S. 410 (1979) (proper to sue Nevada in California court for tort committed in California rejecting Nevada's arguments that sovereignty and comity precluded it from being haled into California's court system). Furthermore, when one state attempts to regulate activity within the boundaries of another state, it is reasonable for the courts in the other state to exercise jurisdiction over the state which is regulating the activity. *St. Croix Waterway Ass'n v. Meyer*, 942 F. Supp. 435, 440-41 (D. Minn. 1996) (where Minnesota and Wisconsin jointly administered regulations pertaining to land and river within Minnesota, a Minnesota resident was able to compel the Wisconsin official to defend a constitutional attack on the regulations in Minnesota).

Stroman and its salespersons are required to obtain Arizona broker's and salesperson's licenses and comply with all of Arizona's laws and regulations if Stroman conducts activities with respect to timeshare resales that if the timeshare is located in Arizona, regardless of the residence of the potential buyer or seller or if it advertises Arizona timeshares on the internet. R 96, 156. Arizona also purports to limit Stroman's communications with non-residents who have Arizona timeshare interests, (R 161) and to regulate Stroman's contact with Arizona residents even when the timeshare is located elsewhere. R 159-60.[10] Arizona has contacted Stroman and sent a cease and desist order and correspondence to Stroman's counsel in Texas insisting that Stroman obtain an Arizona real estate license before conducting these activities occurring in Texas. R 156. The conduct Arizona is regulating is Stroman's conduct in Texas.

Importantly, Arizona asserts that it has control and authority over contracts *even when no Arizona resident is involved in the transaction*. *See* A.Br. at 53. It is not Stroman's acts that "transcend" Arizona's borders but the converse. *Id.* For example, Arizona claims Stroman is subject to penalties even though the owner is a Texas resident. If Stroman accepts payment for its registration/advertising services from a Texas resident, it must maintain copies of documents

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[10] Arizona's cease and desist order alleges Stroman conducted activities with respect to timeshares located in Nevada, California and Colorado.

pertaining to the transaction in Arizona, and also must store copies of employment records for its Texas employees in Arizona. R 98. Stroman is subject to discipline even when the parties have agreed that their contract will be governed by Texas law. *See* R 160. Contrary to the Commissioner's contention that she had no "reason to expect to litigate in Texas District Court" (A.Br. at 55), she had fair warning that her activity may subject her to the jurisdiction of Texas. *See Burger King,* 471 U.S. at 472.

The Commissioner simply cannot claim she has the right to regulate Stroman in Texas and simultaneously exempt herself from the reach of the Texas federal courts. *Stroman Realty, Inc. v. Antt,* 20 F. Supp. 2d. 1050, 1053 (S.D. Tex. 1998) ("A federal court sitting in Houston is a reasonably logical place to litigate a federal constitutional question arising from the officers' attempt to impose their power on a Texan.") As in *Antt,* Arizona has similarly reached into Texas to impose its laws and regulations on Stroman and its customers. R 96, 156, 158-63. "These activities in Texas are not fortuitous or attenuated; they are part of a deliberate effort to exert the officers' authority in Texas" and jurisdiction is appropriate in the district court. *Id.*

The cases on which the Commissioner relies do not support the contention that she is exempt from the jurisdiction of the lower court. *Hildebrand v. Steck Mfg. Co., Inc.,* 279 F.3d 1351 (Fed. Cir. 2002) (A.Br. at 54-55) is completely inapposite. In that case, the court applied Ohio's long-arm statute, which,

unlike the Texas statute, "does *not* grant" the state's "courts jurisdiction to the limits of the due process clause of the fourteenth amendment." 279 F.3d at 1355 (emphasis added). Moreover, unlike the warning letters sent by the patent holder in *Hildebrand,* which had at best a "tenuous" "causal link" to the cause of action in that case, *id.,* the Commissioner's exertion of continuing regulatory control over Stroman's business in Texas has a direct "causal link" to Stroman's complaint.

This same distinction likewise sets Stroman's case apart from *Jarrett v. State of North Carolina,* 868 F. Supp. 155 (D.S.C. 1994). A.Br. at 54-55. There, a recent South Carolina resident, formerly of North Carolina, sued a North Carolina licensing board for releasing his file by mail to a third party in South Carolina. Unlike this single, isolated contact that completed the alleged tort, the Commissioner demands that Stroman and its agents obtain Arizona real estate licenses to deal with any Arizona residents regardless of whether the individual is a client of Stroman (R 96, 161), that Stroman and its agents possess Arizona licenses even when dealing with residents of other states if that discussion involves an Arizona based timeshare (R 96, 156, 159), that Stroman and its agents maintain current licensing by attending continuing education courses, pay fees, and submit filings to the real estate commissioner in Arizona (R 96-99, 161), *inter alia,* all the while Stroman and its agents are conducting business pursuant

to their personal service contracts in Texas. R 87, 92-96.

Thus, the Commissioner's argument that this case "arises out of and relates to activities conducted in Arizona" is factually and legally unsupported. A.Br. at 53. It is precisely because Arizona has reached into Texas and imposed its laws on Stroman that Stroman has a claim against the Commissioner based on her extraterritorial enforcement of Arizona law.

Finally, Texas has a significant interest in adjudicating the dispute. Texas residents are being deprived of the rights to select their own real estate agent and rely on Texas law. *See Burger King,* 471 U.S. at 476-77. Under these circumstances, jurisdiction in Texas is entirely appropriate.

2. Venue is Proper in the Southern District

The Commissioner's argument that venue is proper only in Arizona must be rejected. As the Commissioner recognized, venue in this case is dictated by 28 U.S.C. § 1391(b)(2) where a "substantial part of the events or omissions giving rise to the claim occurred". Here, that jurisdiction is the Southern District of Texas because, as set forth above, that is where the acts "underlying the

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IN THE

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STROMAN REALTY, INC.,
Petitioner,

v.

SAM WERCINSKI,
Commissioner of the Department of Real Estate
for the State of Arizona,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is confusion among the courts of appeals and the district courts regarding the proper standard to apply when assessing whether the exercise of personal jurisdiction is appropriate over non-resident public officials in Section 1983 actions. Some circuits apply the long-arm jurisdiction statutes of the forum state with a Fourteenth Amendment due process analysis while others engraft extra requirements in addition to the standards set forth in the applicable state long-arm statute. There is also disagreement among the circuits as to whether, in a federal question case, a Fourteenth or a Fifth Amendment due process analysis, or any due process analysis at all, should ensue following a determination that jurisdiction exists under the state long-arm statute.

The questions presented for review are as follows:

1. Whether the same personal jurisdictional analysis should apply in a case against a non-resident public official as that applied in a case against a non-resident private litigant, or whether additional minimum contacts should be imposed where the defendant is a state official.
2. Whether the due process analysis of the Fifth Amendment rather than the Fourteenth Amendment should apply in assessing long-arm jurisdiction in a federal question case where the state long-arm statute requirements are met.
3. Whether any due process analysis is required after state long-arm criteria are met if the federal claim is against a public official acting in his official capacity when states have no due process rights.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE COURT SHOULD ESTABLISH THE TEST TO APPLY IN DETERMINING WHETHER JURISDICTION OVER STATE OFFICIALS IN § 1983 ACTIONS COMPORTS WITH DUE PROCESS.

There is a split among the circuits on whether the *Calder*[1] effects test applies in § 1983 actions. There is also disagreement on the proper application of the *Calder* test including the type of intent required.

[1] *Calder v. Jones*, 465 U.S. 783 (1984).

This case is an appropriate vehicle to resolve these questions.

A. The Court Should Provide the Framework for Assessing Jurisdiction in § 1983 Actions.

1. *Whether § 1983 Actions Should Be Treated as Torts in Actions Against Officials Acting in Their Official Capacity.*

The court unequivocally held that a *Kulko*[2] analysis applied in this § 1983 action rather than the purposefully directed tort test of *Calder*. App. 13a. *See also Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386 (5th Cir. 2008) (applying doing business analysis). To excuse this deviation, the Commissioner asserts that "because § 1983 actions are treated as torts for some purposes" does not mean that "they must invariably be treated as torts for purposes of the personal-jurisdiction inquiry." Opp. 22. Whether a § 1983 case against an official in her official capacity constitutes a tort likewise troubled the court but it did not reach the issue. App. 8a. The court nonetheless found the *Calder* test inapplicable. *See* App. 13a.[3] In contrast, other circuits have applied a tort analysis using *Calder* or a similar torts-based test in § 1983 actions. *See* Pet. 14; *Trujillo v. Williams*, 465 F.3d 1210, 1220 (10th Cir.

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[2] *Kulko v. Superior Court*, 436 U.S. 84 (1978).

[3] Unlike *Wercinski*, *Kidwell* declined to apply *Kulko*, reasoning that the "actions of Idaho's officials" were analogous "to the tort of intentional interference with a commercial relationship." *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1268 (5th Cir. 1978), *rev'd on venue grounds sub nom., Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

2006) (court considered *Calder* effects test but declined to find jurisdiction over Virginia prison officials in New Mexico because all relevant conduct by the Virginia defendants occurred in Virginia where prisoner was housed).

This distinction makes a difference. The nature of the underlying case must be considered in determining which due process framework applies. *See Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 104 (3d Cir. 2004) ("'there are different considerations in analyzing jurisdiction over contract claims and over certain tort claims.'") (citation omitted) (noting distinctions between the due process totality of the circumstances test applied in contract cases and the effects test applied in intentional tort claims); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (in tort context the court examines whether defendant "'purposefully directed'" its acts at forum state and in contract cases whether defendant "'purposefully availed' itself of privilege of conducting activities or consummating a transaction in the forum state."). The Court should address this question to provide necessary guidance to the courts in assessing jurisdiction under § 1983 including whether a tort analysis applies to actions against state officials acting in their official capacity.

2. *The Circuits are Divided in the Application of a Commercial Benefit Criterion in § 1983 Cases.*

To avoid the circuit split, the Commissioner claims that the court simply used the *Kulko* economic benefit test because the facts of the underlying case differ from those § 1983 actions where *Calder* was applied. Opp. 18-19. A comparison of the allegations

in those cases with the Fifth Circuit here and Sixth Circuit in *Griepentrog*[4] reveals that in both types of cases the conduct was alleged to be damaging to the plaintiff, illegal and unconstitutional. Nonetheless, the Fifth and Sixth Circuits determined that a different jurisdictional standard should apply if the claim arises out of the enforcement of state or federal law. *See* App. 15a (stating that the Commissioner's intent for her activities "is to uphold and enforce the laws of Arizona."); *Griepentrog*, 954 F.2d at 1178 (stating that "defendants have acted in accord with federal law and these actions do not give rise to personal jurisdiction."); *see also Hannon v. Beard*, 524 F.3d 275, 281 (1st Cir. 2008)[5] (rejecting defendant prison official's *Wercinski*-based argument that personal jurisdiction was lacking because his activities were not "commercial", stating that the

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[4] As the Commissioner acknowledges, *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992), like the Fifth Circuit, did not apply *Calder* and determined that purposeful availment did not exist because "[t]he defendants have never solicited business in Michigan" and "[t]he defendants' states have undertaken no economic activity in the state of Michigan in relation to the disposal sites." Opp. 17; *Griepentrog*, 954 F.2d at 1177.

[5] As in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), the First Circuit in *Hannon* declined to apply an economic benefit criterion to the jurisdictional analysis. *Hannon*, 524 F.3d at 280. The reason *Hannon* addressed commercial activity is because the plaintiff alleged the "transacting business" prong of the state long-arm statute applied. *See id.* at 281. Treating plaintiff's § 1983 claims as a tort, the court found that personal jurisdiction comported with due process because the claims arose from the official's contact with Massachusetts in that the injury alleged would not have occurred but for the official's transfer arrangements, the transfer to Massachusetts constituted purposeful availment and jurisdiction was otherwise reasonable. *Id.* at 282-85.

action in *Wercinski* "attacked the validity of that law" and therefore *Wercinski* was inapplicable).[6]

Thus, the only feature distinguishing *Wercinski* and *Griepentrog* from other § 1983 cases is that the cause of action arose out of the state officials' enforcement activity as opposed to an official's individual misconduct. Other circuits, however, have not found that this distinction compels application of the commercial benefit test. *See* Pet. 19-21. Although the Commissioner writes off *Grand River*'s and *Kronisch*'s[7] lack of an economic benefit factor in assessing personal jurisdiction merely as a function of the facts in those cases, (Opp. 19-21), there is no basis for that assertion and the cases present no less a conflict with cases that articulate and apply this element.

If the nature of the case fits within the *Calder* tort analysis there is no reason to shop for additional criteria that can never be met in either an individual or official capacity case under § 1983. The question for the Court to resolve is whether the official capacity distinction justifies the application of a completely different jurisdictional standard.

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[6] The First Circuit's characterization of Stroman's complaint is inaccurate. Stroman requested injunctive relief based on Arizona's attempt to apply its real estate licensing and related laws to a Texas business and transactions occurring entirely outside of Arizona in violation of the commerce clause. App. 47a, 60a-62a.

[7] *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998).

B. This Court Should Settle the Disagreement Among the Circuits on Whether Intent to Harm is a Necessary Component of the *Calder* Effects Test.

There is a division among the circuits on the nature of the intent required by *Calder*. The Court should settle the question of whether "wrongful" intentional conduct must be alleged. *Compare Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1207-08 (9th Cir. 2006) (en banc) (rejecting French associations' argument that "they have done no more than vindicate their rights under French law, and that their behavior therefore has not been wrongful", instead applying *Calder* and analyzing the associations' "contacts with California relating to [their] dispute with Yahoo!, irrespective of whether they involve wrongful actions . . . .") and *Dudnikov*, 514 F.3d at 1072-73 (noting the conflict but not reaching the issue) *with Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) (intentional act aimed at the forum must be tortious).

To avoid the split, the Commissioner and the court again rely on a purported distinction between the § 1983 cases which apply the *Calder* effects test and official capacity cases based on the intent of the defendant official. There is no basis in this Court's precedent for a special intent standard for official capacity cases. The Commissioner asserts, however, that an official's actions in enforcing state laws "simply do not establish that an official intended to inflict serious harm or injury or that serious harm or injury was likely to follow from the official's actions."[8]

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[8] *See* Opp. 8 (distinguishing *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995), and other cases relied on by Stroman,

Opp. 7. Although the court agreed, other circuits have not imposed a heightened intent standard. *See James v. York County Police Dep't*, 160 Fed. Appx. 126, 134-35, 2005 WL 3313029, at *6 (3d Cir. 2005) (Pennsylvania district court had jurisdiction over California narcotics officer under effects test based on officer's call to Pennsylvania Attorney General's office, sending a package to that office and testifying against plaintiff at a preliminary hearing because the "[officer's] allegedly tortious acts were intended to have an impact on [plaintiff] in Pennsylvania.").[9]

The Commissioner proffers no rationale why unconstitutional conduct performed in an official capacity justifies application of a different intent test than that applied in a suit against a state official in his individual capacity. Indeed, it is doubtful that the state officials sued in their individual capacities had any more "intent" when failing to check fingerprints or arresting the wrong person than the Commissioner did here when she unconstitutionally imposed Arizona regulations on Stroman's business in Texas and required Stroman to conform to Arizona law even when the transactions did not involve Arizona residents. *See Dudnikov*, 514 F.3d at 1077 (noting that defendants in *Calder* were focused on selling newspapers, "not in doing *intentional* harm" to plaintiff but that defendants in *Dudnikov* "*intended* to cause the cancellation of plaintiffs' auction . . . ."). The Commissioner certainly intended

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asserting that the officials in those cases "intended to" or were "at least highly likely to cause harm or injury in another forum, and the plaintiffs were seeking to recover damages for the harm or injury that the officials had caused.").

[9] Nor did the Tenth Circuit in *Trujillo*, an official capacity case, refer to such a requirement. *Trujillo*, 465 F.3d at 1220.

Stroman to modify its conduct to conform to Arizona law. *See Kidwell*, 577 F.2d at 1267 (Idaho officials' regulatory efforts "forseeably changed the [plaintiff's] actions" and that "[t]hese effects, effects with substantial consequences on important business plans" were "more than sufficient to satisfy the minimum contacts requirement.").

While assessment of personal jurisdiction turns on the facts of each case, at a minimum, litigants need to know which analysis applies. In short, does the *Calder* effects test require that the acts directed at the forum be tortious and does a heightened intent standard apply in an official capacity case.

C. The Reasonableness Criteria Asserted by the Commissioner Do Not Support Denial of Certiorari.

The Commissioner highlights the court's concern that finding jurisdiction could "subject any state official enforcing his State's laws to suit in any State where the validity of his State's laws was questioned". Opp. 26. Such a result is unlikely at best. Indeed, other circuits have rejected such concerns. *See Hannon*, 524 F.3d at 283 (court determined exercising jurisdiction would not have this effect because "the harm alleged was directly tied to the contacts establishing personal jurisdiction" and the plaintiff's "claim arises directly from [the official's] contacts with Massachusetts."). *See also* Pet. 22.

Similarly, the federalism concept asserted by the Commissioner and the court as a basis for denying jurisdiction in this case makes no sense in the context of Stroman's case which involves a federal constitutional violation. Indeed, *World-Wide Volkswagon*

v. Woodson, 444 U.S. 286 (1980), relied on by the court and the Commissioner, was a diversity case, not a federal claim. Issues of state sovereignty, however, have little pertinence to a commerce clause claim—a question of national concern and the preservation of an economic union. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 472 (2005). If anything, federalism concerns support jurisdiction in Texas. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (noting a state's "especial interest in exercising judicial jurisdiction over those who commit torts within its territory."). Likewise, the court's concern with a multiplicity of inconsistent verdicts (App. 18a) will be magnified, not reduced, by forcing Stroman or other similarly situated plaintiffs to go to each separate jurisdiction whose officials seek to exert their regulatory power extraterritorially on citizens of other states.

II. THE COURT SHOULD DETERMINE WHETHER A FIFTH OR FOURTEENTH AMENDMENT DUE PROCESS ANALYSIS APPLIES IN A FEDERAL QUESTION CASE.

The Commissioner asserts Stroman waived the issue of whether a Fifth versus a Fourteenth Amendment due process analysis applies in a federal question case. Opp. 33. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S.Ct. 1199 (2007), and *Fry v. Pliler*, 127 S.Ct. 2321 (2007), relied on by the Commissioner do not support her argument. In those cases, the Court refused to consider certain issues because the litigants had not raised them in the petitions for certiorari and the issues were irrelevant to the questions presented. *See Travelers*, 127 S.Ct. at 1207 n.5 (declining to consider appellee's

argument that "was not raised in PG&E's brief in opposition to certiorari, and bears no relation to the question presented."); *Fry*, 127 S.Ct. at 2327 (declining to consider argument "not fairly encompassed within the question presented" and for which the Court granted certiorari and was only briefly referenced in the petition for certiorari). In contrast, here, the Court has discretion to consider the issue because it is addressed in the petition for writ of certiorari and fairly encompassed in the issue of when personal jurisdiction may be exercised over state officials. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 & n.27 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000).

Application of a Fourteenth Amendment limitation requiring contacts with the forum ignores the constitutional distinction between the federal claims asserted by Stroman and a diversity case. As the court noted in *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.3d 610 (1st Cir. 2001), "[t]his distinction matters because under the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state. . . . At the same time, however, the plaintiff must still ground its service of process in a federal statute or civil rule." *Swiss Am. Bank*, 274 F.3d at 618 (citations omitted). *But see Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008) (reversing finding of jurisdiction over the state officials of Florida and California based on inquiry limited to the reach of the Fourteenth Amendment's Due Process Clause because § 1983 lacks a provision for service of process). If statutory service requirements are met, however, there is no reason to impose such a limitation on a federal court's

jurisdiction in a federal question case. *See* Pet. 27-30. The Court should grant certiorari to answer the question of whether a Fifth Amendment due process analysis applies in a federal question case where service is effected under a state long-arm statute.

III. THE COURT SHOULD DETERMINE WHETHER A PUBLIC OFFICIAL ACTING IN HIS OFFICIAL CAPACITY SHOULD BE TREATED AS A PERSON FOR PURPOSES OF THE DUE PROCESS CLAUSE.

This Court has never addressed the extent and application of the "fiction" permitting suits against public officials in their official capacities. In *Kidwell*, the court determined that even in official capacity cases the official is treated as a person for all purposes because his unconstitutional conduct stripped him of any immunity. *Kidwell*, 577 F.2d at 1265. The court here, however, raised the question whether a public official should be considered a "person" in a case permissible under the *Young*[10] fiction. App. 8a. While it makes sense to treat the official as a "person" for purposes of the long-arm statute, it does not follow that a due process analysis should apply when the suit is, in reality, an action against the State. *See* Pet. 32.

The Commissioner asserts, however, that if the due process analysis is discarded in a *Young* type case, the case automatically becomes an impermissible suit against the State. Opp. 34 (relying on *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506

[10] *Ex parte Young*, 209 U.S. 123 (1908).

U.S. 139 (1993)).[11] *Metcalf & Eddy*, however, stands for no such proposition. What that case stands for is that, unless a suit falls within the *Young* exception, the state is immune from suit and that denial of immunity is immediately appealable. The Commissioner offers no reason why the *Young* fiction should be extended beyond Eleventh Amendment immunity onto Fifth and Fourteenth Amendment due process analyses for personal jurisdiction. As the Commissioner admits, the underpinning of the personal jurisdiction requirement is the *individual* liberty interest of the due process clause. Opp. 29. As such, it has no bearing on whether jurisdiction should be asserted over a state official acting in his official capacity. The Court should grant certiorari to answer the question of whether any due process analysis applies in the first instance.

CONCLUSION

For the foregoing reasons and those set forth in Stroman's Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] The Commissioner's assertion of waiver with respect to this argument should be rejected for the reasons set forth in Part II, *supra*.